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Supreme Court, U.S.
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NO. 93-

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IN THE
SUPREME COURT OF THE UNITED STATES COURT
OCTOBER TERM, 1993

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LAURANCE KRIEGEL, Petitioner
vs.
UNITED STATES OF AMERICA
Acting through the Small Business Administration (SBA), the United States Department of Agriculture (USDA), and the Agriculture Stabilization Conservation Service (ASCS), Respondent

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Petition for WRIT OF CERTIORARI
from the UNITED STATES COURT OF APPEALS
for the FIFTH CIRCUIT

==========

PETITION FOR WRIT OF CERTIORARI

LAURANCE KRIEGEL

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Bovina, Texas 79009
Telephone 806-238-1423
Petitioner, pro se

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QUESTIONS PRESENTED

1. The decision rendered on April 21, and March 19, 1993 does not conform to the Fifth Circuit Court cases or other Circuit Court cases or Federal Rules Decisions cited in Petitioner's brief in regard to Respondent receiving a Motion for Summary Judgment when outstanding discovery which was ordered by the District Court was still not turned over to Petitioner.

> Respondent obtained a summary judgment in this case despite their blatant refusal to comply with discovery orders of the District Court. Under the provisions of Netto v. Amtrak, 863 F.2d 1210 (5th Cir. 1989) and Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017

(5th Cir. 1983), and *Littlejohn*, Supra at 1115 which recognized the entitlement of a party to discovery prior to the granting of a summary judgment.

The fact that the discovery requested by Petitioner herein was substantial and material is supported by the Court's own orders set forth heretofore, and, particularly the orders of the Magistrate entered July 5, 1991 and the order of the Court entered July 16, 1991.

Inherent within those orders is a finding that the discovery was relevant and material to issues to be presented at trial.

By the granting of a summary judgment herein the Court erroneously, *de facto* ignored its own prior orders and thereby deprived Petitioner of his right to a fair

trial after being in possession of all relevant discovery.

By the granting of a summary judgment before discovery was complete, herein the Courts have deprived and violated Petitioner's right to his Article III, Fifth, and Fourteenth Amendment right to the U.S. Constitution of Liberty, Pursuit of Happiness, and Judicial due process.

2. Whether the Court correctly interpreted the provisions of 7 U.S.C. § 1465 as providing for discretionary rather than mandatory implementation of crop acreage base adjustments; and, further whether the actions of the United State by and through the Department of Agriculture and the ASCS actually implemented crop acreage base adjustments for certain individuals and refused to do so for Petitioner and were acting in an arbitrary

and capricious manner.

The Court incorrectly interpreted the use of the word "may" in 7 U.S.C. § 1465 as permissive rather than mandatory, to the extent or requiring implementation or acreage exchanges of a 10% crop acreage base exchange from one program crop to another program crop. The intent of Congress clearly reveals in the Reasons for Granting The Writ section that Congress intended this part of the program to be implemented affirmatively. Supporting Senate Reports statements do not reveal Congress enacted a program implemented in the manner the Secretary of Agriculture has implemented it.

Further, denial of discovery prevented proof *de facto* implementation of the program in an arbitrary and capricious manner and improper termination of such

program without required notice.

By the granting of a summary judgment without supplying supporting discovery documents showing conditions existed to suspend the 10 % base adjustment of 7 U.S.C. 1465 and before discovery was complete to determine if implementation was allowed to other farmers, herein the Courts have deprived and violated Petitioner's right to his Article III, Fifth, and Fourteenth Amendment right to the U.S. Constitution of Liberty, Pursuit of Happiness, and Judicial due process.

3. Whether the method of implementation by the Secretary of Agriculture to change from one program crop to another denies Petitioner his Constitutional right of Liberty based upon the Fifth and/or Fourteenth Amendment right of the United States Constitution.

Based on the following reasons: 1) to be out of the Farm Program FIVE years, 2) receiving less than a one for one base acreage exchange between program crops when making a request, and 3) forfeiting farm program benefits, to build a different history for those program corps.

4. Whether the Court's have denied Petitioner his right of Judicial Due Process based upon Article III, Fifth, and Fourteenth amendment to the U.S. Constitution.

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Petitioner, pro se

Petitioner, Laurance Kriegel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit: 1) refusing to acknowledge outstanding discovery was ordered to be turned over to Petitioner by the Honorable United States District Judge and the Honorable United States Magistrate before granting a Motion for Summary Judgment to Respondent, denying Petitioner his right of Judicial due process, 2) refusing to acknowledge the intent of Congress in regard to the use of the word "May" as being mandatory instead of permissive, 3) refusing to acknowledge Petitioner did not receive all discovery ordered by the Court to determine if other farmers received base acreage exchanges

which Petitioner was not able to receive before granting a motion for Summary Judgment to Respondent, 4) refusing to acknowledge Respondent did not produce documents showing the 10% base acreage exchange could not be granted according to the requirements of 7 U.S.C. 1465 as presented in the Motion for leave to Amend, which was the information Petitioner had prepared for oral argument, 5) the method implemented by the Secretary of Agriculture, to be out of the Farm Program FIVE years, and/or receiving less than a one for one base acreage exchange between program crops, to build history of those corps denies Petitioner right of Liberty.

OPINIONS BELOW

The opinion dated March 19, 1993 and

denial of rehearing dated April 21, 1993 of the Court of Appeals for the Fifth Circuit affirmed [Appendix G & H] the U.S. District Courts opinion [Appendix F] for the Northern District of Texas, Amarillo Division. These opinion's were not published.

JURISDICTION

Petitioner's Brief to The Court of Appeals' in this matter was filed on April 14, 1992. A Motion for leave to file a supplemental brief was timely filed on March 8, 1993 and was denied by the Court of Appeals on March 16, 1993. A timely Petition for Rehearing was filed and The Court of Appeals' denied it on April 21, 1993. This Courts's Jurisdiction is invoked under Title 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Organic Laws of the Declaration of Independence, Article III of the U.S. Constitution, Amendment V, and XIV to the U.S. Constitution is set forth in the Appendix.

STATEMENT OF THE CASE

The United States District Court, Northern District of Texas, Amarillo Division, had jurisdiction pursuant to Title 28 U.S.C. 1331.

On September 8, 1989; March 2, 1990; and February 6, 1991 three (3) separate actions were filed in the United States District Court for the Northern District of Texas, Amarillo Division ("the District Court") contesting the actions of the SBA, USDA, AND ASCS. Petitioner exhausted his

administrative appeal rights with ASCS for crop years 1987, 1988, and 1989 formulating the three separate actions. These actions were filed by Petitioner, *pro se*, and were later consolidated by the District Court.

In previous orders of the Court, not only were the actions consolidated but the Civil Rights and Federal Tort Claims causes of action were dismissed.

A substantial part of my claim against USDA and ASCS were questions involving exchange of acreage allotted to the production of certain crops and the establishment of base yields for my farm.

At a hearing on August 17, 1990 The Honorable Clinton E. Averitte, Magistrate for the United States District Court for the Northern District of Texas, Amarillo

Division ("the Magistrate") determined an entered a order (appendix A) on Oct. 2, 1990 compelling Respondent/Defendant to answer discovery submitted by Petitioner/Plaintiff. On September 21, 1990 Petitioner filed a document (not in Appendix) captioned "Motion, Brief, and Petition to Compel Defendant to Turn Over the First Set of Interrogatories" form [Sic] All Employes [Sic] of Farwell, TX ASCS office". This document placed the Court on notice that Respondent had failed to comply with prior orders of the Court regarding discovery.

On October 2, 1990 the Magistrate entered a discovery order compelling compliance on or before October 12, 1990.

On October 19, 1990 Petitioner filed a document (Appendix B) captioned "Motion,

Brief, and Petition to Compel Defendant, ASCS, to Turn Over Answered Written Interrogatory Questions" form [sic] All Employes [sic] of the Parmer Co. ACSC office. This document placed the Court on further notice that Respondent had failed to comply with two (2) prior orders of the Court regarding discovery.

This Oct. 19, 1990 document was relevant at all times to the decision rendered on October 24, 1991. In addition, it formed the basis for the July 5, 1991 order of the Magistrate and July 16, 1991 order of the Court compelling discovery.

On May 2, 1991 I filed my motion for summary judgment against Defendant ASCS.

On July 5, 1991 the Magistrate entered an order compelling additional discovery. See Appendix C.

On July 16, 1991 The Honorable Mary Lou Robinson entered an order denying Defendant's application for review of the Magistrate's order of July 5, 1991. That order further set forth that "Defendant shall produce on or before July 19, 1991, all documents set out in the Magistrate's order". See Appendix D.

On October 24, 1991 The Honorable Mary Lou Robinson entered an "ORDER DENYING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT" ["Opinion"]. That order contains a lengthy discussion of the case before the Court, the issues presented, and the rulings on each issues. It does **NOT** address discovery.

The summary judgment in this case,

granted by the Court on October 24, 1991, was granted at a time when the Respondent, was in violation of at least two (2) orders of the Court compelling discovery and obtained a judgment for such Respondent in spite of its noncompliance with the discovery orders of the Court.

On April 14, 1992 Petitioner filed brief with the Fifth Circuit Court of Appeals.

On Feb. 24, 1993 the Clerk of the United States Court of Appeals wrote stating

"The panel to whom the above referenced case was assigned has determined under FRAP 34 (a) that oral argument will not be required in this case. Therefore, counsel need not appeal for argument on Tuesday, March 2, 1993."

On March 2, 1993 the Clerk of the United States Court of Appeals wrote informing me the prepared remarks for oral

argument would need to be accepted with a motion for leave to supplement the brief.

On March 16, 1993 the United States Court of Appeals filed a order denying appellant request for leave to file a supplemental brief.

On March 19, 1993 the United States Court of Appeals panel hearing my case filed a order affirming the District Court.

On April 21, 1993 the United States Court of Appeals denied the Suggestion For Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This Petition presents an important issue of federal law to be resolved by this Court; and the Opinion below conflicts with the Fifth Circuits

decisions and decisions of other Circuits.

Petitioner has the Constitutional right of Article III to the United States Constitution, Declaration of Independence, fifth Amendment, and fourteenth Amendment of Liberty, Pursuit of Happiness, of Judicial Due Process to expect to receive the discovery ordered by the District Court before being denied my motion for Summary Judgement.

(1) In a motion for summary judgment filed by Petitioner dated May 2, 1991, the absence of discovery was clearly pointed out to the Court. On page 5 of that motion with a attached Exhibit "C" to that Motion, is the following statement "the following items are deemed admitted by Defendant, ASCS Federal Rules of Civil Procedure 37(a)(3) for giving incomplete

and evasive answers on the seventh set of interrogatories, request for admissions and production of documents from Defendant ASCS. A similiar statement is on page 8 & 10 in regard to the sixth and fourth set of interrogatories.

On July 5, 1991, the Magistrate ordered [Appendix C] Respondent to produce a substantial amount of information requested in the seventh set of interrogatories and request for documents. That order was confirmed by the District Court on July 16, 1991 [Appendix D].

Inherent within the Court's orders on discovery was a finding that the requested discovery would be helpful in presenting the case for trial or, at least, in opposing a motion for summary judgment, contrary to the facts in Paul Kadair, Inc.

v. *Sony Corp. of America* 694 F.2d 1017 (5th Cir. 1983) at 1030.

The 5th Circuit Court in *Kadair, Supra* held that:

"...a Plaintiff's entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited and may be cut off **when the record shows** [emphasis added] that the requested discovery is not likely to produce the facts needed by Plaintiff to withstand a *Rule* 56(e) motion for summary judgment."

In Petitioner's case, quite the contrary is true. By the District Court's rulings, first by the Magistrate on July 5, 1991 [Appendix C], and then by the Court herself on July 16, 1991 [Appendix D], when the Court was considering an application for review of the Magistrate's order of July 5, 1991, the Court ordered the documents produced. This is a part of the record. It also clearly shows that the District Court felt that the requested

discovery is likely to produce facts needed by Petitioner to withstand a Rule 56(e) motion for summary judgment.

Petitioner's case is more similar to, but goes beyond the facts, of *Littlejohn v. Shell Oil Company, et al* 483 F.2d 1140 (5th Cir. 1973).

1. In *Littlejohn* there had been no discovery.
2. There were no discovery orders.
3. There was a motion for summary judgment filed by the Defendant.
4. There was even a letter from Plaintiff's counsel arguably agreeing to postponing discovery until a ruling on the motion for summary judgment.

In this case, however, there was:

1. Extensive prior discovery.
2. There were two (2) Court orders

expressly compelling discovery by Respondent, which discovery was never had.

3. A history of resistance to discovery by Respondent.

4. A motion for summary judgment by Petitioner which motion pointed out to the Court the lack of compliance with discovery by Respondent.

5. Respondent requested judgement relief in there "Answer to Plaintiff's Consolidated Complaint for Declaratory Judgment and Rights and Counterclaim [dated 4-23-91, Docket entry 83], No separate "Motion for Summary Judgment" was filed by Respondent. Respondent did not produce all additional information required by the District Court on the July 5 and July 16, 91 orders to defeat Petitioners Rule 56 Motion for Summary

Judgment. The information to be turned over by these orders was acreage bases for all the farms 5 farmers farmed in 1986 and 1987. The information sought for each year was to be compared between each year to determine if changes in program bases had occurred on any of these five farmers farms. The five farmers farms requested were not shown and could not be determined from a Exhibit, dated Aug. 30, 1990, produced by Respondent. At a mediation hearing of approximately Feb. 3, 1993, held in another case in which the same U.S. Attorney was present as represents this case, the U.S. Attorney held up a bag of documents and stated these are the documents which contain the subject matter which the U.S. District Judge ordered to be turned over to Petitioner and is the

subject matter of this appeal. Respondent did not produce any information required by 7 U.S.C. 1465 to show "No Market Factors existed" or "No Short Supply existed" to suspend the 10% farm program base exchange to defeat Petitioner's Motion for Summary Judgment. This information was requested in the Fourth Request for Production of Documents [questions 1 & 2] attached to Petitioner's Motion for Summary Judgment. Rather, the Court *sua sponte* entered a summary judgement in favor of Respondent, the non-movant. See footnote 12 of the District Court's "Order" [Appendix F]. The Honorable Mary Lou Robinson Arbitrarily determined no fact issues remained to be decided by the statement on page 7 of Her opinion, when ther were fact issuses.

"The Court may terminate litigation by rendering a summary judgment where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Honors v. Douglas*, 833 F. 2d. 565, 567 (5th Cir.).

Petitioner's case clearly falls within the classification set forth in *Littlejohn Supra* at 1115 in which the Court stated "the fatality rate in summarily disposing of litigation in this manner is high indeed, and largely the result of prematurity through inordinate attention to theories of law at a time when the facts have not been fully developed."

Rule 56(f) FRCP provides:

"should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other

order as is just."

Petitioner should have been given

"...the opportunity to discover in an effort to make such proof." *Littlejohn Supra at 1146.*

The Courts have consistently punished, rather than rewarded discovery abuse. However, in this case, Respondent was rewarded for its abuse of Court Ordered discovery by the ultimate sanction against Petitioner, a take nothing judgment which severed and preserved Respondent's counterclaim.

This Court has spoken most strongly on such a sanction, only in the reverse of this case, regarding discovery entitlement.

"This Circuit permits the drastic sanction of dismissal or judgment by default only in extreme situations where there is clear record of contumacious conduct." *Durham v. Florida East Coast RY. CO.* 385 F. 366 (5th Cir. 1967); *Flaksa*

v. Little River Marine Construction Co., 389 F. 2d 885 (5th Cir. 1968); GPI Computer Industries, Inc., 476 F.2d 1 at 5 (5th Cir. 1973).

This case is fraught with the problems of discovery. The Courts have taken a most strong position in maintaining their control over litigants and assuring a just outcome and preserve the power of the Courts' Orders.

"On this basis of these facts, which appear on the record, the Court finds that it must grant Plaintiff's motion for judgment and deny Defendant's motion for relief from sanctions. To do otherwise would be an open admission by this Court that it can do nothing when a party in a civil suit deliberately flouts its orders." Factory Air Conditioning Corp. v. Westwide Toyota, Inc. 579 F.2d 334 at 337 (1978) see National Hockey League v. Met. Hockey Club, 427 U.S. 639, 643, 96 S. Ct. 2778, 49 L.Ed.2d 747 (1976).

In a parallel case the Fifth Circuit Court's own discovery Order provided:

"On or before July 27, 1977, the Defendant will comply with this Court's Order of May 16th, or its answer and counterclaim will be stricken and judgment entered for Plaintiff on both the complaint and the counterclaim. Factory

Air Conditioning, Supra see Emerick V, Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976).

The Supreme Court has ruled on parallel cases:

"In our view, the plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be `no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving part's case necessarily renders all other facts immaterial. The moving party is `entitled to a judgment as a matter of law' because the non moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corporation v. Myrtle Nell Catrett, Administratrix of the Estate of Louis H. Catrett, Deceased*, 477 U.S. 317, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265(1986) *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505,2511, 91 L.Ed.2d 202 (1986).*

"To survive petitioners' motion for summary judgment, respondents must establish that there is genuine issue of

material fact.....Second, the issue of fact must be `genuine'. Fed. Rules Civ. Proc. 56(c),(e). When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. ... In the language of the Rule, the nonmoving party must come forward with `specific facts showing that there is a genuine issue for trial'. Fed. Rule Civ. Proc. 56(e). *Matsushita Electric Industrial Co. Ltd., v. Zenith Radio Corporation*, 475 U.S. 572, 106 S.Ct. 1348, 1356, 89 L.Ed.2d. 538 (1986).

See also *Robinson v. Transamerica Insurance Co.* 368 F.2d. 37 (1966 10th Cir); *Fountain v. Filson et al.* 69 S.Ct 754; 336 U.S. 681.

As stated early, In Petitioner's case Respondent did not file additional fact information to defeat Petitioner's Motion for Summary Judgment. There is genuine fact issues to be determined. The joint pretrial order filed by both parties shows at least nine fact issues to be determined.

The District Court and Court of

Appeals opinions clearly make arbitrary finding. The cases for the summary judgment standard quoted by the District Court on page 7 of the District Courts "Opinion", Appendix F are the same as Petitioner has presented [Anderson *v. Liberty Lobby, Inc.* and *Celotex Corp. v. Catrett*]. The Courts below have incorrectly applied these cases to this case. There are contested facts in the Pretrial Order before the Court. As shown above there are facts still to be determined from the outstanding discovery orders of the Court below.

"Summary judgment is impossible in this case, because there are disputes as to the facts and the credibility of witnesses, on which plaintiff is entitled to trial by jury. Cf. *Whitaker v. Coleman* (CCA 5th)115 F (2d)305." *Sartor v. Arkansas's Nat. Gas. Corp.* 64 S.Ct. 724, 88 L. Ed. 967, 321 U.S. 620.

With respect to misleading and

evasive answers, such as the District Court obviously found in this case as it entered multiple Orders compelling discovery directed to Respondent, the Courts have taken a strong position in support of the party seeking the discovery.

"We need not go so far in our holding that when a party in its answer to interrogatories misleads another party into believing that a defense will not be offered at trial, the later introduction of that defense will support a motion for a new trial. Misleading and evasive answers to interrogatories justify the court's viewing with suspicion the contentions of the party so answering. *Ruiz v. Hamburg-American Line* 478 F.2d 29 (9th Cir. 1973) see, e.g., *Alamo Theater Co., Inc., et al.*, 22 F.R.D. 42 (N.D. Ill. 1958) *Zielinski v. Philadelphia Piers, Inc.*, 139 F. Supp. 408 (E.D. Penn. 1952).

On a motion to compel under Rule 33(c) to provide documents, the burden has been, almost uniformly, placed on the party responding to discovery and

presumably with better knowledge of their whereabouts, to ascertain the location of the documents requested

"While this provision is designed to relieve the interrogated party from `burdensome or expensive research into his own records in order to give an answer,' it does not allow that party to `impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records.' 4A Moore, Federal Practice and Procedure, Advisory Committee Note of 1970 to Amended Rule 33, sec. 33.01 [6], p.33-13 (1971 ed.). Rule 33 cannot, therefore, be used as a procedural device for avoiding the duty to give information by shifting the obligation to find out whether information is ascertainable from the records which have been tendered. *IN Re Master Key*, 53 F.R.D. 87 (D. Conn.1971); *Thomason v. Leiter*, 52 F.R.D. 290 (M.D.Ala.1971). And, to properly invoke the provisions of Rule 33 (c), the interrogated party must `specify the records from which the answer may be derived or ascertained,' in addition to giving the interrogating party a reasonable opportunity to examine and copy the records. [emphasis added]. Thus, a broad statement that the information sought is ascertainable generally from documents and that those documents are available for inspection is not a sufficient answer under Rule 33 (c). Rather, the interrogated party must state

specifically and precisely identify which documents will provide the information to be elicited. Such specificity is contemplated both by the Rule and by the Manual for Complex and MultiDistrict Litigation, which expressly envisions first-wave discovery disclosing `the existence, location and custodian of documents,' among other things." Budget Rent-A-Car of Missouri, Inc. v Hertz Corporation 55 F.R.D. 354 at 357 (1972)

If Respondent could not furnish the information and details required, such Respondent was required to so state under oath and should set forth in detail the efforts made to obtain the information. 4A Moore, Federal Practice and Procedure § 33.26, p. 33-140 (1971 ed.) see Budget Rent-A-Car of Missouri, Inc., Supra at 357 (1972).

However, in rulings from both the Magistrate and the Court, herself, the Court found Respondent's answers insufficient. In such a case the cases are

clear.

"The Court finds that such an answer is insufficient. An interrogatory will not be held objectionable as calling for research if it relates to details alleged in the pleading of the interrogated party, about which it presumably has information, or if the interrogated party would gather the information in preparation of its own case." *Flour Mills of America, Inc. v. Pace* 75 F.R.D. 676 at 680 (1977); see *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459 (S.D.N.Y. 1974); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 59 F.R.D. 500 (N.D.ILL. 1973); *United States v. 216 Bottles, more or less etc.*, 36 F.R.D. 695 (E.D.N.Y. 1965); *Lampert v. Reynolds Metals Co.*, 25 F.R.D. 175 (D.Or.1960) rev'd on other grounds, 316 F.2d 272 (9th Cir. 1963) cert. denied, 376 U.S. 910, 84 S. Ct 664, 11 L.Ed.2d 608 (1964).

It has long been the rule that:

"A party cannot refuse to answer an interrogatory simply because he would have to consult books or documents in order to prepare a response." *Flour Mills of America, Inc. v. Pace* 75 F.R.D. 676; see *King v. Georgia Power Company*, 50 F.R.D. 134 (N.D.Ga.1970).

Neither is it a sufficient response to make:

"a broad statement that the information sought is available from a mass of documents and that the documents are available for inspection simply is not a sufficient response to satisfy the aims of discovery. *Flour Mills of America, Inc. v. Pace, Supra; see Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.* 64 F.R.D. 459 (S.D.N.Y.1974).

And such was exactly the position taken herein by Respondent.

The fact that the United States was a party should have, in no way, abrogated the discovery rules as to it. Such rules have broad application.

"Rule 26 (b)(1), supra, provides, in part, that discovery may be obtained 'regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action'" *Flour Mills of America, Inc. v. Pace, Supra* at 679; see *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct 234, 13 L.Ed.2d 152 (1964). "Relevancy is broadly construed at the discovery stage of litigation and a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." *Flour Mills of America, Inc. v. Pace, Supra* at

680; see *Smith v. Schlesinger*, 168 U.S.App.D.C. 204, 513 F.2d 462 (1975); *Detweiler Bros., v. John Graham and Company*, 412 F.Supp. 416 (E.D.Wash.1976); *Cleo Wrap Corp. v. Elsner Engineering Works, Inc.*, 59 F.R.D.386 (M.D.Pa.1972); *Balistrieri v. O'Farrell*, 57 F.R.D. 567 (E.D.Wis.1972). "Discovery rules are to be accorded a broad and liberal treatment." *Flour Mills of America, Inc. v. Pace, Supra* at 680 (1977); see *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

Further, the answers which were given were deliberately calculated to mislead *pro se* Plaintiff and cause him to:

1. Expend inordinate amounts of time in constructing documents to bring the deficiencies of Respondent's discovery responses to the Court's attention; and

2. Divert his attention from the research required to ascertain that the hazard of a *sua sponte* Summary Judgment from the Court was the real nemesis to be avoided.

"Any denial of an interrogatory which is calculated to lead to evidence would thwart the purposes of the Federal Rules of Civil Procedure." *Flour Mills of America, Inc. v. Pace, Supra* at 680 (1977); see *Hartsfield v. Gulf Oil Corp.*, 29 F.R.D. 163 (E.D.Pa.1962). "Rule 33, supra, does not sanction oppression by interrogatories. An objection will be sustained if either a particular interrogatory or a set of interrogatories is thought by the Court to be so broad and all inclusive as to be burdensome. Wright & Miller, Federal Practice and Procedure: Civil sec. 2174. In making that determination the Court must balance the burden on the interrogated party against the benefit that having the information would provide to the party submitting the interrogatory." *Flour Mills of America, Inc. v. Pace, Supra* at 680 (1977); see *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10 Cir. 1975). "The burden is on the objecting party to show why an interrogatory is improper." *Flour Mills of America, Inc. v. Pace, Supra* at 680 (1977); *United States v. 58.16 Acres of Land, more or less in Clinton County, State of Ill.*, 66 F.R.D. 570 (E.D. Ill.1975); *Rogers v Tri-State Materials Corp.*, 51 F.R.D. 234 (N.D.W.Va.1970).

The entry of a summary judgment, essentially sua sponte, by the District Court while this discovery was outstanding

and while completely ignoring the Court's own orders (which were not mentioned in the Court's opinion) constitutes a clear abuse of discretion by the Court; an action completely outside the spirit of Rule 56(f). Perhaps the District Court felt, as she stated at pages 5 and 6 of her "Opinion":

> "The Court has spent an inordinate amount of time analyzing Plaintiff's complaint which is less than clear."

This hardly expresses the spirit of Haines v. Kerner 404 U.S. 519, 92 S.Ct. 594, 30 l.Ed.2d 652 (1972) dealing with pro se representation before the Courts; particularly with respect to their pleading.

Petitioner who was proceeding pro se relied on the orders of the Court to result in the delivery of the documents

and information which he needed to develop his case. Petitioner relied on the wording of Respondent's motions and had no idea that a summary judgment would be granted sua *sponte* by the Court against him, especially when Respondent did not file a seperate motion requesting same. Clearly, the ruling:

> "...came on for disposition before Plaintiff could have his day in discovery." *Littlejohn Supra* at 1146.

In Petitioner's Motion for Summary Judgment on page 10 with a attached Exhibit "E" question 1 and 2, [Docket item no. 87; Forth Set of Request for Interrogatories] shows Respondent clearly did not produce at any time during the case any published documents to show conditions existed to allow the USDA to suspend the implementation of 7 U.S.C.

1465 (a) {Title V sec. 505 (a) 85 Food and Security Act}.

Question 1. Please furnish a (sic) ASCS newsletter and copy of the notice published in the federal register which shows plaintiff that a short supply of a program crop existed to suspend the 10 % farm base acre exchange of Title V sec. 505 (b) (1) of the 85 Food and Security act."

Response: Objection. This interrogatory requests information which is not relevant to any issue presently before the Court in this case and is not likely to lead to the discovery of relevant information. Moreover, the interrogatory is onerous and burdensome because it is not limited to a county or a state and would, therefore, seemingly require the search of records maintained by ASCS nationwide before it could be answered. In addition, the interrogatory is onerous and burdensome because it does not identify the date or dates of the requested information and, therefore, would require a search of ASCS records for an unspecified period of time. Lastly, this interrogatory contains a reference which cannot be located.

Question 2. "Please furnish a (sic) ASCS newsletter and copy of a notice published in the federal register which shows plaintiff, market factors of a program crop existed which require the

suspension of the 10 % farm Base exchange [Title V sec. 505 (b)(2) of the 85 Food and security act]."

Response: Objection. This interrogatory requests information which is not relevant to any issue presently before the Court in this case and is not likely to lead to the discovery of relevant information. Moreover, the interrogatory is onerous and burdensome because it is not limited to a county or a state and would, therefore, seemingly require the search of records maintained by ASCS nationwide before it could be answered. In addition, the interrogatory is onerous and burdensome because it does not identify the date or dates of the requested information and, therefore, would require a search of ASCS records for an unspecified period of time. Lastly, this interrogatory contains a reference which cannot be located.

This substantial discovery sought was never turned over to Petitoner.

Petitioner has discovered subsequently the existence of at least one such document. At page two (2) of the United States Department of Agriculture - ASCS notice PA1157 received in the Bailey

County ASCS office on July 20, 1987 is contained the following statement:

"FAB's will be established, although no CAB adjustments will be permitted under the authority to increase CAB's by up to ten percent (10%) of the FAB, with a corresponding downward adjustment of other CAB's."

Petitioner interprets CAB to be an abbreviation of the term crop acreage base and FAB to be an abbreviation of the term farm acreage base.

A substantial portion of the discovery sought and ordered by the Court very probably have lead to a determination that, either:

1. The Secretary never determined according to 7 U.S.C. 1465 (b) (1) a short supply exists or (b) (2) market factors exist to suspend the 10% adjustment of 7 U.S.C. 1465 (a); or

2. that Petitioner is entitled to

reasonable discovery to demonstrate that:

(a) the Secretary instituted the program in Parmer County, Texas through his authorized representatives and that it was implemented in an arbitrary and capricious manner; and

(b) that he unilaterally terminated the same without the proper notice or determinations as required; or

3. Favoritism in granting base exchanges to other farmers was made.

Petitioner requests this court make the above finding.

The Courts attention is now requested on item number two (2) and (3) before the Court:

Whether the Court correctly interpreted the provisions of 7 U.S.C. § 1465 (a) as providing for discretionary

rather than mandatory implementation of program crop acreage base adjustments through a exchange of 10% per year from one program crop to another program crop and, further whether the actions of the Secretary of Agriculture acted in an arbitrary and capricious manner by not making the necessary determinations to withhold implementation of 7 U.S.C. 1465.

7 U.S.C. § 1465 provides as follows:

(a) The Secretary **may** [emphasis added] provide for an upward adjustment of any crop acreage base for any farm for any crop year. Except as provided in Subsection (b) of this Section, such adjustment may not exceed the number of acres that is equal to ten percent (10%) of the farm acreage base for such farm for such crop year. Any upward adjustment in a crop acreage base must be offset by an equivalent downward adjustment in one or more other crop acreage bases established for the farm for such crop year.

(b) The Secretary **may suspend**, [emphasis added] on a nation-wide basis, **any limitation** [emphasis added] contained in Subsection (a) of this Section with

respect to crop acreage base for any program crop if the secretary determines that:

(b)(1) a short supply or other similar emergency situation exists with respect to the program crop; or

(b)(2) market factors exist that require the suspension of the limitation to achieve the purposes of the program.

In 1984 the United States Court of Appeals for the Tenth Circuit was called upon to determine the use of the word "may" as used in 7 U.S.C. § 1981(a) dealing with the Farmer's Home Administration (the FMHA). That act provides that:

"...the Secretary may permit at the request of the borrower, the deferral...". The Court held "the word 'may', the Secretary 'may' permit deferral, is, in our view, a reference to the discretion of the Secretary to grant the deferral upon a showing by a borrower. It does not mean as the Secretary argues that he has the discretion whether or not to implement the Act at all and not to consider any "requests" under the statutory standards. It is difficult to understand how the

Secretary can assert no action need be taken under the statute when it was enacted to meet an urgent need for relief from conditions beyond the farmers' control, when congress recited at the outset that the Section was in addition to any other authority that the Secretary may have, and when the Act states that a request is required which presumably would trigger consideration of the factors by the Secretary." *Matzke v. Block*, 732 F.2d 799(10th Cir. 1984) at 801.

7 U.S.C. § 1461 provides:

"The purpose of this title is to prescribe a system for establishing farm and crop acreage bases and program yields for the wheat, feed grain, upland cotton, and rice programs under this Act that is efficient, **equitable**, flexible, and **predictable**." [emphasis added]

The parallel between 7 U.S.C. 1465 and 7 U.S.C. 1981(a) is substantial. Both deal with the farmers of this country and the financing of their crop systems. Both the Farmers Home Administration, loans and ASCS payments provide the working capital for the farming program of this country. The Court addressed the intent of the

Congress in providing for the Secretary to grant deferrals in order to assist farmers in remaining in the practice of producing agricultural commodities.

Section 1461, *et seq* deals with the actual establishment of crop acreage bases and program yields for farms involved in the program for certain controlled commodities. The establishment of those acreage bases and program yields directly affects program payments for the farmers.

Section 1461 seems a clear mandate to the Secretary of Agriculture and the ASCS to implement the provisions of § 1465 and provide for crop adjustment. This program, as any other program of the Federal Government, should be administered in a fair and even-handed manner and not arbitraryly.

Petitioner has shown the ASCS, changes needed to be made on the farm to have a successful farm operation. The following list of cases shows the intent of Congress that the use of the word `may' has the intent for the Administrative Branch to implement all farm program benefits to a farmer according to the various courts ruling which lead up to the enactment of the 87 Farm Credit Act. This Act changed the word "May" to "Shall" in 7 U.S.C. 1981a.

Allison v. Block, Berends v. Butz, Chandler v. Block, Coleman v. Block, Curry v. Block, Gamradt v. Block, Jacoby v. Schuman, Kjeldahl v. Block, Matzke v. Block, Shick v. FmHA of U.S.D.A., United States v. Hamrick, United States v. Servaes, cites omitted.

Congress changed the language of the word "May" to "Shall" in another statute as a result of the Courts ruling quoted in

United States v. Servaes, 608 F. Supp. 775 (D.C.Mo. 1985) at 781 where 7 U.S.C. 1961 was changed from `may' to `Shall' in 1978. Also in SERVAES at p. 778 the Court rejected the Secretary's argument that implementation of sec. 1981a was to be left to the discretion of the Department of Agriculture. Similarly in this case I request the Court to reject the lack of implementation by the Secretary of Agriculture and require 7 U.S.C. 1465 should read "Shall" instead of `may'.

USDA disallowed the implementation of the 10% exchange of program crop acreage bases. The following conditions of 7 U.S.C. 1465 (b) (1) and (2) [Title V (b)(1) and (2) of the 85 Food and Security Act] are the only statutory method available to the USDA to not implement 7

U.S.C. 1465 (a).

Termination of programs at the whim of the Secretary was dealt with in *Berends v. Butz* 357 F. Supp. 143 (DC Minn. 1973). That was a case in which the Secretary actually published notice of the implementation of a program giving a definite "cut-off" date. Substantially short of the published date the Secretary unilaterally terminated the program. The Court held:

"It is the opinion of the Court that the Defendants have a ministerial duty to implement the emergency loan program as directed by Congress, that the unilateral termination of the program without notice to Plaintiffs in this case was in violation of the statutes, the agencies own regulations, and due process of law... "Furthermore to the extent that the Administrators may have some discretion under the applicable statutes, in terminating the emergency loan program in Minnesota without prior notice, the Administrator acted in an arbitrary and capricious manner".

When the Secretary asserts that he refuses to implement the program or when and if a determination is made that the program is being, in fact, implemented in an arbitrary and capricious manner then the power of the Courts is necessary to right the wrong and enforce the mandate of Congress as well as to protect the rights of the farmer.

A substantial part of Petitioner case revolved around his financial difficulties, ultimately resulting in the filing of a Chapter 12 bankruptcy. A part of that bankruptcy was the plan of reorganization in which he proposed to alter the crop utilization of his farmland. Because Respondent, ASCS, refused to allow the alteration of the crop utilization of his farmland,

Petitioner plan in the Chapter 12 case failed. Subsequently the SBA offset my ASCS payments resulting in more severe economic hardship. In a subsequent Chapter 12 proceeding, the "stay" pursuant to 11 U.S.C. § 362 was lifted and I lost my land. The crux of this suit revolves around the abuse of the farm program by the ASCS as it relates to Petitioner.

Before I filed my first Bankruptcy plan in 86, I evaluated were the losses were in the farm operation. They were Due to low prices and weather related problems in growing a large acreage of Cotton. Large acreage of cotton is not the normal cropping pattern in the area my farm is located in. I was continuing to demonstrate cotton was not the normal cropping pattern for my farm. [A

allowable ASCS change was to demonstrate a cropping pattern was not normal for the farm in the 81 Farm program]. Common business practices allow removing areas of losses. I have been confined to growing crops where losses occur. I also needed more acres of wheat to control Johnsongrass which was taking over. Chemical control of Johnsongrass was to expensive and not effective.

Under the Food and Agriculture Act of 1981 section 7 U.S.C. 1461 uses the word equitable for establishing farm program bases. During the 81 program a farmer was allowed to build history of a program crop, as the mechanism to change from one program crop to another. This history was then used in a 5 year average history to determine the allotment of the program

crop. I began building that history in the crop of wheat two years before the 85 Food and Security Act came into effect. In the 81 farm program, when I planted more acreage of wheat than I was allotted I did not receive program payments on that overplanted crop (ex. Wheat).

Under the 85 Food and Security Act, 7 U.S.C. 1461, required establishing bases to be determined in a fair, flexible, predictable, and equitable manner. The mechanism for exchanging crop acreage bases from one program crop to another as implemented by The secretary of agriculture during The 85 Food and Security Act was, to be out of the Farm Program on all crops for up to 5 years, thus forgoing program payments on all crops for five years. [Even through the

only implementation available for an upward adjustment of any crop acreage base as published in 7 CFR § 713.100 (now 7 CFR § 1413.101) requires actual cessation of participation in the program for one full crop year, with the inherent loss of ASCS payments during that year in order to reestablish a new crop acreage base for farmland.] In my case 3 program crops. In 1987 This would have been approx. a $30,000 loss of program benefits on my farm. Surely such cannot be said to be either equitable or flexible as the terms are used in 7 U.S.C. § 1461. Being out of the farm program for 5 years would build the average history for all crop allotments over the 5 year period. This is called limited cross compliance (7 CFR 713.100 now located at 7 CFR 1413.101). I

planted triticale, a non-program crop similar to wheat, within the program limits to show the continued need for a change in the pattern of cropping practice, during the 85 Food and Security Act. The Secretary of Agriculture's method of implementation denies Petitioner his right of Liberty and Pursuit of Happiness to manage his farm in a profitable manner.

The Sec. of Agriculture went back into a previous farm bill, which had expired, to obtain enough rules to accomplish the procedure called limited cross compliance. The Seventh set of interrogatories in docket entry # 87 Motion for Summary Judgment against ASCS with its attached Exhibit "A" question 6 shows Respondent's answer to were Limited

Cross Compliance is located.

"The general regulations pertaining to cross compliance and limited cross compliance existed before the Food Security Act of 1985, Pub.L. 99-198 (December 23, 1985). However, the Act, as amended, did contain several specific references to these subjects, to-wit: Sec. 308 (7 U.S.C. 1445b-3(n); sec. 401 (7 U.S.C. 1444e(n); sec. 501 (7 U.S.C. 1444-1(n) and sec. 601 (7 U.S.C. 1441-1(n)). See also 7 U.S.C. 1421 (c)."

The language of these cites is similar. The one pertaining to wheat is:

(n) Eligibility preconditions

(1) Except as provided in paragraphs (2) and (3), compliance on a farm with the terms and conditions of any other commodity program may not be required as a condition of eligibility for loans, purchases, or payments under this section.

(2) The Secretary may require that, as a condition of eligibility of producers on a farm for loans, purchases, or payments under this section, the acreage planted for harvest on the farm to any other commodity for which an acreage limitation program is in effect not exceed the crop acreage base for that commodity.

(3) If a set-aside program is established

for a crop of wheat under subsection (f)(3) of this section, compliance on a farm with the terms and conditions of any other commodity program may be required as a condition of eligibility for loans, purchases, or payments under this section.

I interpret these items to mean I am not allowed to plant over the normal acreage of a allotted crop when a farmer is not making a request for a change. Example. If I have a Allotment of 100 acres of wheat. I would not be allowed to plant 105 acres of wheat and receive program payments. It does not include any conditions to lose program crop bases while going through a approved administrative appeal process [7 U.S.C. 1469, 7 CFR 780] requesting exchanges between farm program bases. It does not include any conditions to require Petitioner to be out of the Farm Program

Five years to build a different history of program crops than those established.

Senate report 99-145 on Senate Bill 1714 [P.L. 99-198] states:

"Adjustments may be made in the acreage base to reflect established crop-rotation practices and other necessary factors necessary to determine a fair and equitable base."

This quote is similar to 7 U.S.C. 1468.

Petitioner's requests for base exchanges have not requested acreage in excess of the cropland of the farm. A required set-aside program was not applicable from 1980-1992, which could have been a condition for limited cross compliance.

Respondent produced one document, dated Aug. 30, 1990, which showed 15 farmers requested to exchange one program

crop for another program crop. My farm is C-108 the first farm listed. Several ASCS options or listed showing how ASCS would allow the exchange. Total bases of wheat and cotton was 253 acres [first column]. This Exhibit Shows a loss of program bases for Farm C-108 of approx. 193 acres under the normal column and approx. 100 acres under 5-PA-186 column. This is very definitely not fair, or equitable. All of the other farmers listed on the document received less than a one for one base acre exchange. I have not found within Legislative History this type of implementation to be the intent of Congress.

The table in this document shows none of the 15 farmers received a one for one base acre exchange. This Method

implemented by Sec. of Ag. does not allow for a equitable exchange, with the loss of program bases and program payments, when the farmer determines the operation of the farm requires changes to be successful [The planting of another program crop]. The is contrary to the intent of the 85 Food and Security Act at 7 U.S.C. 1461 to be efficient, flexible, equitable and predictable. A acre for acre exchange has never been offered to me since the request for changes have been made beginning in 1986 thru 1990. All offers which were presented to me have been turned down for this reason. These offers deny Petitioner his right to "Liberty".

The 85 Food and Security Act, does not state a loss of bases is required for a exchange of bases in 7 U.S.C. 1461 and

following, nor does Senate Report 99-145 which accompanies S-1714, or Legislative History for P.L. 99-198. They do state necessary changes be fair and equitable. My Bankruptcy Plan, and Farm and Home Plans with FmHA, cash flow projections with Federal Land Bank [FLB], and other lenders will not be feasible with the loss of ASCS program payments for even one year to establish a different history of program crop acres other than the ones established.

The 85 Food and Security Act Section 1465 allowed a 10 % exchange per year of one program crop to another. In the hearing for P.L. 99-198, Serial No. 99-5 April 18, 1985 H.R. 1614 and H.R. 1656 one organization requested bases could be exchanged at 20% per year [page 249]

In the case of *U.S. v. Rodgers* 103 S.CT. 2132 a case which discusses the word "May". The discussion at Page 2149 states:

"and can be defeated by indication of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute".

The case of *Matzke v. Block* 732 F. 2d 799 (10 Cir. 1984) defines the purpose of the statutes and 7 U.S.C. 1461, Legislative History for P.L. 99-198, Senate Report 99-145 shows the intent of Congress.

In *Matzke v. Block* the court stated in regard to the previous restructuring, 7 U.S.C. 1981a (before the 87 Farm Credit Act) of debt by FmHA, which was not being implemented, in part. "The carefully considered remedy devised by Congress for a particular and serious problem was not put into operation".

The same is true for the 10% base exchange of 7 U.S.C. 1465. The Secretary

of Agriculture did not make the determinations of 7 U.S.C. 1465 (b).

Also Quoted within *Matzke v. Block* to support Petitioners argument ASCS is acting in A Arbitrary manner:

"The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative polices affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations. *Mortion v. Ruiz*, 415 U.S. 199, 94 S.Ct 1055, 39 L. Ed.2d 270."

The Mandatory Nature of 7 U.S.C. 1981a in *Gamradt v. Block* 581 F.Supp. 122, 128-130. (U.S. District Court, Minnesota) is clear.

"Both the language of the Statute and its legislative history convince this court that sec. 1981a mandates implementation of the deferral program." ... Judge Van Sickle aptly stated in *Coleman v. Block* 562 F.Supp. 1353, 1361 (D.N.D. 1983) "But when the Congress assembled speaks with all the pomp and ceremony of a statutory enactment, I must presume its language mandates something."

... "The Court finds, based on the language of the statute and its history, that Congress intended sec. 1981a be implemented. Accordingly, the Agency failure to act is unlawfully in violation of 5 U.S.C. 706(1) and arbitrary, capricious and an abuse of discretion in violation of 5 U.S.C. 706(2)(A).

The same condition exists within ASCS as did exist within FmHA. Congress extended to me the right through appeal, 7 C.F.R. 780, to make changes on my farm so it can be more profitable, but USDA-ASCS has not allowed any equitable changes.

The exchanging of program crop acreage bases is not implemented in the manner intended by Congress. I have not found in Legislative History for P.L. 99-198 or Senate report 99-145 any statements which would require me to be out of the farm program any amount of time to make a change from one program crop to another in my farm operation. I do not find any

statements which would require the implementation of the Program in the manner it has been implemented. I have found a statement which reads like 7 U.S.C. 1468 reads "Adjustments may be made in the acreage base to reflect established crop-rotation practices and other factors necessary in determining a fair and equitable base" [Senate Report 99-145, page 403], without any conditions placed upon it [ex. being out of the Farm Program one or more years, to allow the COUNTY COMMITTEE to establish bases which are fair and equitable]. Therefore the implementation of this part of the Program is Arbitrary, Capricious, and a Abuse of discretion in regard to not allowing the exchange 10 % of program crop bases form one program crop to another.

The Farm program was set up to benefit the farmer. Petitioner's fifth and fourteenth amendment Constitutional right to receive liberty and pursue happiness are being denied; 1) when Respondent did not produce the data to support the suspension of a Farm Program benefit of a 10 % program crop base exchange per year as provided by statute, 7 U.S.C. 1465(a); 2) when Petititioner is required to be out of the Farm Program up to 5 years, according to the current method of implementation of the farm program by ASCS, without receiving program benefits to build history of other program crops; 3) when Petitioner is required to receive less than a one for one base acre exchange, which is the current ASCS method of changing program bases. Petitioner

should be allowed to make equiable changes while remaining within th Farm Program. Liberty has been defined it many ways.

"The liberty guaranteed by the 14th Amendment to the Federal Constitution denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pu__uit of happiness by free men."

"The liberty protected by the 14th Amendment to the Federal Constitution may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." Note 1 and 2 of *Meyers v. Nebraska* 390 U.S. 1921.

4) This presentation shows Petitioner's right of Judicial Due Process has been denied based upon Article III, Fifth, and Fourteenth amendment to the

U.S. Constitution.

CONCLUSION

This Court should grant certiorari to what I perceive to be an incorrect interpretation of the statute, and denial of Constitution rights coupled with the granting of a summary judgment for the Respondent herein, notwithstanding the fact that discovery remained outstanding, notwithstanding the fact that documents were not produced to show the Secretary had the authority to suspend the 10 % crop acreage base exchange of 7 U.S.C. 1465 and, further, to resolve the conflict between the Circuits created by the Fifth Circuit's (on discovery) decision in this matter. The cases cited clearly reveal the order of the Fifth Circuit Court of

Appeals on March 19, 1993 or the Order for Rehearing on April 21, 1993 does not conform to the standard of the decisions of the Fifth Circuit Court or the standard from other Circuits Courts opinions or Supreme Court opinions.

Petitioner requests this Court to determine that, either:

1. The wording of 7 U.S.C. 1465 (a) is mandatory in requiring an adjustment by the Secretary; and Respondent had an affirmative duty to implement the act; or

2. The Secretary never make a determination according to 7 U.S.C. 1465 (b) (1) a short supply exists or (b) (2) market factors exist to suspend the 10% adjustment of 7 U.S.C. 1465 (a).

3. Pursuant to the Fifth and Fourteenth Amendment, "The implementation

by the Secretary of Agriculture, to exchange one program crop to another by being out of the Farm Program FIVE years (to build a different history of those program corps and forfeit farm program payments), and/or receiving less than a one for one base acreage exchange between program crops, denies Petitioner his Constitutional right of Liberty".

I also request this Court to determine wherther Petitioner right of Judicial Due Process has been denied based upon Article III, Fifth, and Fourteenth amendment to the U.S. Constitution..

For the reasons set forth above, a writ of certiorari should issue to review the Judgment and Opinion of the Court of Appeals in this matter. 1/ I respectfully request the Court to reverse this matter

and remand it to the District Court for further discovery requested above and trial.

July 16th, 1993 Respectfully submitted,

Laurance Kriegel

Laurance Kriegel, Pro Se
Petitioner
HCR-1 Box 52
Bovina, Texas 79009
Telephone 806-238-1423

1/ If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of the Court's opinions in Colemen vs. Block, Matke vs. Block, Berends vs. Butz, and the 87 Farm Credit Act, and Anderson, vs. Liberty Lobby, Inc., Cites omitted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

LAURANCE KRIEGEL, Plaintiff,	:	
v.	:	CA 2-89-0175
United States of America, ET AL: Defendants.	:	

DISCOVERY ORDER

On September 28, 1990, plaintiff's motion to compel defendant U.S.D.A. to answer plaintiff's interrogatories was referred to the undersigned United States Magistrate for determination.

On October 1, 1990, the government filed a responsive pleading to plaintiff's motion to compel, correctly reciting that the Magistrate did not order all unnamed and non-party employees of ASCS office in Farwell, Texas, to answer plaintiff's interrogatories. Plaintiff's motion to compel discovery from non-parties was denied on the ground plaintiff could not

serve interrogatories on non-parties in the manner he had attempted. The government's pleading further correctly states that the Magistrate took under advisement the issue of compelling defendants Wesley Barnett and Vernon Willard to respond to plaintiff's interrogatories and in fact, granted the government's motion for a protective order pending further ruling of the Court.

The government's response is not correct and is inaccurate to the extent such response leaves the impression that no further order was made. While no written order was entered, the government was ordered, at the hearing on August 17, 1990, to provide plaintiff, on or before August 31, 1990, in response to plaintiff's motion to compel answers to interrogatories from defendant USDA-ASCS,

specific information for the years 1986 and 1987 relating to farms in Parmer County, Texas. The government was to have supplied plaintiff with the total number of farms in Parmer County, Texas, which underwent any acreage change from a cotton base to a wheat base during 1986 or 1987. With respect to any cotton to wheat base change, defendant was to further provide plaintiff with the total number of acres changed from a cotton base to wheat base. That information was to be supplied to plaintiff on or before August 31, 1990. Government's counsel was present in open court when such was Ordered.

The Government's response filed October 1, 1990, does not reflect the information has been supplied as ordered. To the extent such information has not been supplied, the government shall

provide the information recited above to plaintiff on or before October 12, 1990. The government shall advise the Court as to its compliance. Upon receipt of such information from the government, plaintiff will have the right to reurge his motion to compel, as discussed in the hearing on August 17, 1990, and may reurge such motion to compel by additional pleading, specifically reciting what additional information he seeks to compel based upon the information received from the government.

IT IS SO ORDERED.

ENTERED the 2nd day of October, 1990.

original signed by

Clinton E. Averitte

United States Magistrate

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

LAURANCE KRIEGEL, PLAINTIFF,	:	
VS.	:	NO. CA-2-89-0175
USDA-ASCS, CLAYTON YEUTTER, SEC. OF AGRICULTURE, ET AL DEFENDANT.	:	

MOTION, BRIEF AND PETITION TO COMPEL DEFENDANT, ASCS, TO TURN OVER ANSWERED WRITTEN INTERROGATORY QUESTIONS FORM ALL EMPLOYEES OF THE PARMER CO. ASCS OFFICE

PLAINTIFF REQUESTED INFORMATION FROM ALL EMPLOYEES OF THE PARMER COUNTY ASCS OFFICE TO LEARN HOW THE FARM PROGRAM COULD BETTER BE IMPLEMENTED BY ASCS AND TO LEARN HOW PLAINTIFF WAS BEING TREATED BY ASCS.

PLAINTIFF HAS NOT YET RECEIVED THESE ANSWERS, INFORMATION, AND ADMISSIONS WHICH

WERE REQUESTED. PLAINTIFF REQUEST THE COURT COMPEL DEFENDANT, ASCS, TO HAVE THESE QUESTIONS ANSWERED AND TURN OVER THIS INFORMATION. THE INFORMATION RECEIVED BY THE FIRST PRODUCTION OF DOCUMENTS REVEALS SOME OTHER FARMERS DID RECEIVE A EXCHANGE OF BASES FROM COTTON TO WHEAT. THESE ANSWERED QUESTIONS WILL AID IN THE DISCOVERY PROCESS. THE INFORMATION SOUGHT IS NOT PRIVILEGED, IS RELEVANT TO THE SUBJECT MATTER INVOLVED IN THE PENDING ACTION AND WILL LEAD TO ADMISSIBLE EVIDENCE.

PLAINTIFF HAS COMPLAINED IN HIS AMENDED PLEADING TREATMENT RECEIVED BY HIM WAS DIFFERENT THAN THAT RECEIVED OF OTHER FARMERS.

THIS INFORMATION IS NECESSARY TO SHOW THE

UNDUE BIAS OF THE DECISION MAKERS, THAT PLAINTIFF WAS TREATED DIFFERENTLY THAN OTHER FARMERS, THAT PLAINTIFF WAS NOT ALLOWED THE BENEFIT OF THE LAW, TO SHOW THAT ASCS DECISIONS WERE ARBRITARY, CARPRIOUS, AND A ABUSE OF DISCRECTIONARY AUTHORITY.

THE INTERROGATORIES HAVE BEEN SERVED PROPERLY ACCORDING TO RULE 33 AND 36, RULE 37 ALLOWS THE COURT TO COMPEL DISCOVERY FROM DEFENDANT, ASCS. MISCELLANEOUS ORDER #29 RULE 2.2 ALLOWS INTERROGATORIES TO BE FILED WITH THE COURT WHEN ACCOMPANIED WITH A MOTION.

DATED: OCT. 19, 1990

RESPECTFULLY SUBMITTED

original signed by
LAURANCE KRIEGEL
HCR 1 BOX 52
BOVINA, TEXAS 79009
806 238 1423
PRO SE

APPENDIX B

CERTIFICATE OF CONFERENCE

THE UNDERSIGNED, LAURANCE KRIEGEL, ATTEMPTED TO CONFER WITH THE DEFENDANT BY PHONE ON OCT. 18, 1990 AT 376-2356. ATTORNEY FOR DEFENDANT, JIM LAURENCE, WAS AVAILABLE AND DISAGREED.

original signed by
LAURANCE KRIEGEL
HCR 1 BOX 52
BOVINA, TEXAS 79009
806-238-1423
PRO SE

APPENDIX B

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES THAT ON THE 19th DAY OF OCT., 1990 A TRUE AND CORRECT COPY OF THE ABOVE AND FOREGOING WAS DEPOSITED IN THE UNITED STATES MAIL, POSTAGE PREPAID, AND PROPERLY ADDRESSED TO:

JAMES P. LAURENCE
ASSISTANT U. S. ATTORNEY
ROOM 308, 205 E. 5 TH ST., BOX 13236
AMARILLO, TEXAS 79189

DANIEL A. BOWEN
ASSISTANT REGIONAL ATTORNEY
OFFICE OF THE GENERAL COUNSEL
UNITED STATES DEPARTMENT OF AGRICULTURE
TEMPLE, TEXAS 76501

CLERK OF U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
205 E. 5 TH ST. BOX F-13240
AMARILLO, TEXAS 79189

original signed by
LAURANCE KRIEGEL
HCR 1 BOX 52
BOVINA, TEXAS 79009
806-238-1423
PRO SE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

LAURANCE KRIEGEL,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CA 2-89-0175
	:	
UNITED STATES OF AMERICA, ET AL.,	:	
	:	
Defendants,	:	

ORDER

By order of referral filed March 28, 1991, plaintiff's pleading entitled, "Request to Set Hearing" which was treated as a Motion to Compel Discovery, was referred to the undersigned United States Magistrate Judge for determination. A Hearing on plaintiff's motion was set for May 10, 1991, at which hearing plaintiff appeared pro se, and defendant appeared by and through the Assistant United States

Attorney. The Court Ordered plaintiff to supplement his motion to compel. Plaintiff did so by a pleading filed May 16, 1991, entitled "Brief to Obtain Answer to Question No. 2 of Plaintiff's Seventh Set of Interrogatories and Requests for Documents" and "Brief for Request for Information on Question No. 5 of Plaintiff's Seventh Set of Interrogatories and Requests for Documents." The government filed a response on May 24, 1991.

In his May 16, 1991 pleading, plaintiff appears to request, with respect to certain farm numbers, the yields and any base acreage changes for those farms. In support of his motion, plaintiff contends the County Committee Minutes from May 1990 through September 1990 reflect that yields on certain farms were set

(Question No. 5). Plaintiff also appears to request, with respect to Question No. 2 of his Seventh Set of Interrogatories, the highest yield of record for various crops.

The government's response contends the information sought is irrelevant. With respect to certain information, defendant advises they did check a list of five names to determine if the farms in question had received base acreage exchanges. Defendant determined no base acreage exchanges from one crop to another were made, but a base adjustment was made.

It is the Order of the Court that plaintiff's pleading entitled, "Request to Set Hearing" having been treated as a Motion to Compel Discovery, is Denied as to all matters requested, Except the following:

APPENDIX C

1. The defendant shall provide, provided they have not already done so, any base acreage crop exchanges for the five farms or farm numbers which plaintiff has previously given to the defendant.

2. The defendant shall provide to plaintiff, without being required to identify any specific farm number, the highest established yield per acre in Parmer County, Texas, for the particular crops plaintiff produces and the lowest established yield for those crops. In addition to providing such high and low yields for plaintiff's crops, the defendant shall also provide to plaintiff the high and low yields for the crops plaintiff has attempted to exchange base acres for.

All items shall be provided to plaintiff on or before Monday, July 15,

APPENDIX C

1991.

Any relief not granted by this Order is DENIED.

IT IS SO ORDERED.

ENTERED this 5th day of July 1991.

original signed by

CLINTON E. AVERITTE

UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

LAURENCE KRIEGEL, Plaintiff,	:	CA 2-89-175
v.	:	Consolidated with CA 2-90-0051
UNITED STATES OF AMERICA, acting through the Small Business Administration, the United States Dept. of Agriculture (USDA) and the Agriculture Stabilization Conservation service, (ASCS) Defendant.	:	Consolidated with CA 2-91-28

ORDER

Before the Court is Defendant's Application for Review of Magistrate's Order entered on July 5, 1991.

Defendant's Application for Review is Denied. Defendant shall produce on or before July 19, 1991, all the documents set out in lthe Magistrate's Order.

It is SO ORDERED.

APPENDIX D

Signed this the 16th day of July, 1991.

orginal signed by

Mary Low Robinson

UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

LAURANCE KRIEGEL, PLAINTIFF,	:	
VS.	:	CA-2-89-0175
UNITED STATES OF AMERICA, acting through the SMALL BUSINESS ADMINISTRATION (SBA) the UNITED STATES DEPARTMENT of AGRICULTURE (USDA), and the AGRICULTURE STABILIZATION CONSERVATION SERVICE (ASCS), DEFENDANT.	:	consolidated with CA-2-90-0051 CA-2-91-0028

RESPONSE TO ORDER OF JULY 5 AND 16, 1991

COMES NOW, PLAINTIFF, in response to the Order of the Magistrate to compel discovery entered on July 5, and request of review of the order by Defendant on July 16, 1991 to inform the court information has not been received by, PLAINTIFF, on item no. 1 of the

Magistrates order.

> Item no. 1 stated "The defendant shall provide, provided they have not already done so, any base acreage crop exchanges for the five farms or farm numbers which plaintiff has previously given to the defendant".

Information has not been received by Plaintiff of any type to show Plaintiff or the Court the acreage of these five farms and/or entities where exchanged or adjusted in accordance with procedure.

Plaintiff has been in contact with Daniel Bowen, attorney for defendant, plans are not to supply any information.

Enough information is available to provide the information set out in item no. 2 of the Magistrates Order.

Respectfully Submitted,
original signed by
Laurance Kriegel
Pro Se

APPENDIX E

HCR 1 Box 52
Bovina, Texas 79009
806-238-1423

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES THAT ON THE 24th DAY OF July, 1991 A TRUE AND CORRECT COPY OF THE ABOVE AND FOREGOING WAS DEPOSITED IN THE UNITED STATES MAIL, POSTAGE PREPAID, AND PROPERLY ADDRESSED TO:

JAMES P. LAURENCE
ASSISTANT U. S. ATTORNEY
ROOM 308, 205 E. 5 TH ST., BOX 13236
AMARILLO, TEXAS 79189

DANIEL A. BOWEN
ASSISTANT REGIONAL ATTORNEY
OFFICE OF THE GENERAL COUNSEL
UNITED STATES DEPARTMENT OF AGRICULTURE
TEMPLE, TEXAS 76501

CLERK OF U.S.
DISTRICT COURT
NORTHERN DISTRICT
OF TEXAS
205 E. 5 TH ST.
BOX F-13240
AMARILLO, TEXAS 79189

original signed by

Laurance Kriegel

Pro Se

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

LAURENCE KRIEGEL,	§	
	§	
PLAINTIFF,	§	CAUSE NUMBER
	§	CA-2-89-175
V.	§	
	§	
UNITED STATES OF AMERICA, acting through the Small Business Administration (SBA), the United States Department of Agriculture (USDA), and the Agriculture Stabilization Conservation Service, (ASCS),	§	CONSOLIDATED WITH CA-2-90-0051
	§	CONSOLIDATED WITH CA-2-91-28
DEFENDANT.	§	

ORDER DENYING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AND ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

Before the Court are Plaintiff's Motions for Summary Judgment, and Defendant's Responses in which the Government contends that it is entitled to

judgment and not Plaintiff.[1]

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[1]In the Pre-Trial Order at page 2, Plaintiff and Defendant state that Plaintiff's Motions for Summary Judgment are still pending, and that Defendant has filed Responses seeking summary judgment on all issues.

Moreover, the Fifth Circuit has held that "when 'one party moves for summary judgment the district court, in an appropriate case, may grant summary judgment against the movant, even though the opposite party has not actually filed a motion for summary judgment.'" Matter of Caravan Refrigerated Cargo, Inc., 864 F.2d 388, 393 (5th Cir. 1989), citing Landry v. G.B.A., 762 F.2d 462,464 (5th Cir. 1985) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure: Civil 2d §2720).

Wright & Miller states that summary judgment is granted in favor of the non-moving party in order to keep

> with the objective of Rule 56 to expedite the disposition of cases, and, somewhat more remotely, with the mandate of Rule 54(c) requiring the court to grant relief to which a party is entitled 'even if the party has not demanded such relief in his pleadings.'"

§2720 at 33.

In the case at hand, the Court finds that both parties have briefed the issues before the Court on the motions for summary judgment. Accordingly, the Court finds it proper to consider Defendant's Responses as a cross motions for summary

Before the Court is also Defendant's Motion to Dismiss.

The Court has considered Plaintiff's allegations contained in his pleadings, Plaintiff's summary judgment evidence, and certain undisputed documents tendered by Defendant as follows: 1) SBA appeal record, 2) Plaintiff's deposition and deposition exhibits, 3) the written decision of the Deputy Administrator, State & County Operations, ASCS, U.S.D.A., and 4) ASCS handbook.

Plaintiff's allegations are confusing, difficult to determine. The Court, however, has sought to determine Plaintiff's complaints and whether he has stated a cause of action. The Court concludes that under the undisputed

---

judgment on the same issues. Evans v. Midland Enterprises Inc., 754 F.Supp. 92, 95 (M.D.La 1990).

evidence taken in the light most favorable to the Plaintiff, Plaintiff cannot prevail. Therefore, Plaintiff's Motions for Summary Judgment are DENIED, Defendant's prayer for judgment in its favor on Plaintiff's cause of action is GRANTED.

I. STATEMENT OF FACTS

Plaintiff is an American farmer from Bovina, Texas. Throughout his complaint, he criticizes the changes in American farming policy as briefly outlined below.

American farming has been on a down turn for several years. In the seventies FmHA and SBA made many operating loans and disaster loans to American Farmers on the basis that their land values were increasing and on the hope that farm product prices might increase. As long as land values continued to increase the

status quo remained. Farmers rolled loans over from year to year, and borrowed more money from FmHA and the SBA.

When land values began to decrease in 1981-1982, the FmHA and SBA could no longer lend money simply on the value of farm land. By 1982-1983, it was clear that the FmHA had over extended its lending capacity. FmHA thus changed its policy and reduced the number of loans to farmers, and increased the six year statute of limitations to collect on federal debts to ten years.

In the late seventies and early eighties, Plaintiff made several operating loans and disaster loans with the Farmers Home Administration (FmHA)[2] and the Small Business Administration (SBA) hoping that

---

[2]The Court is not addressing the FmHA loans in this action.

farm prices would increase. Plaintiff has not made a principal or interest payment on the SBA loans since 1978-79. In the mid eighties, SBA attempted without success to collect on its loans. By 1988-1989, SBA decided to recover on its loans by administrative offset. In September of 1989, Plaintiff appealed the Lubbock SBA Administrative decision to offset Plaintiff's ASCS payment. On October 26, 1989, the Office of Hearings and Appeals (OHA) in Washington, denied Plaintiff's appeal and held that the SBA could collect the amount claimed through administrative offset of funds due Plaintiff from ASCS. On November 7, 1989, the SBA commenced an "administrative offset" under 31 U.S.C.A. § 3716, and seized Plaintiff's ASCS payments in a sum of approximately $8,000.00. Plaintiff has appealed in this

Court the OHA review of the administrative decision.

The Agriculture Stabilization Conservation Service (ASCS) also subsidized Plaintiff's production of "program crops," which were primarily cotton. On March 18, 1986, Plaintiff requested the ASCS to exchange the acres subsidized for cotton production to wheat claiming that the cotton, as previously established for the farm, was no longer the normal farming operation. The ASCS did not allow the acre for acre exchange. On February 3, 1987, the Parmer County ASCS office denied Plaintiff's request to raise yields. Plaintiff felt in a bind. If he wanted to produce wheat instead of cotton without an acre for acre exchange, he would lose part of the ASCS program payment. However, if he continued to

produce cotton and receive the ASCS program payment, he still would not make a profit.

On November 26, 1986, Plaintiff filed a chapter 12 bankruptcy. On April 8, 1987, the Bankrupty Court confirmed a plan that contemplated production of wheat instead of cotton. Plaintiff continued to try in every possible way, through administrative appeals, to exchange the acres allotted to wheat in order to retain ASCS payment.

On April 30, 1987, the state ASCS committee ruled that it did not have the authority to establish or adjust crop acreage basis in a manner other than that required in regulations and procedures issued at the national level of ASCS. On September 18, 1987, the Deputy Administrator for the State and County

Operations (DASCO) denied Plaintiff's appeal stating that the Secretary may permit a crop for crop exchange but that the Secretary was not required to do so.

On March 9, 1989, Plaintiff's bankruptcy plan was dismissed for failure to make plan payments. Plaintiff claims that the bankruptcy plan could not be profitable because he was forced to produce cotton instead of wheat and the cotton target prices, as opposed to wheat, were below cost of production.

On February 16, 1990, the County Committee denied another of Plaintiff's attempt to raise the yields to the alleged productive potential of the farm and to exchange 10% of the crop acreage base for each of the last four years. Additionally, on December 6, 1990, the State Committee denied Plaintiff's request

to raise yields stating that the County and State committees base their determination on 7 C.F.R. § 1413.6 which provides that the 1990 farm program payment would be equal to the 1986 and 1987 crop years.

On September 8, 1989, on March 2, 1990, and on February 6, 1991, Plaintiff, proceeding pro se, repeatedly filed lengthy, and confusing declaratory judgment actions. The Court has previously consolidated all three actions and dismissed Plaintiff's civil rights and Federal Tort claims causes of actions.

The Court has spent an inordinate amount of time analyzing Plaintiff's complaint which is less than clear. The Court interprets Plaintiff's thirty (30) page consolidated complaint to allege two main causes of action.

First, Plaintiff has brought an action to set aside ASCS's refusal to exchange crop allotment and to adjust program payment yields. In support of this action, Plaintiff attacks the existence of the ASCS 1) for failing to comply with publication requirements of the APA; 2) for violating his civil rights; 3) for interfering with Plaintiff's Chapter 12 Bankruptcy. In addition, Plaintiff alleges a general complaint against U.S. farm policy, namely that the statutes, rules and regulations do not conform with the intent of Congress to help U.S. farmers through these hard times.

Second, Plaintiff has brought a claim to set aside SBA's action in taking the administrative offset, to secure a write off of the debt Plaintiff owed to

Defendant SBA, and to secure a return to Plaintiff of the $8,844.52 ASCS payment that SBA took by administrative offset. In support of this action, Plaintiff claims that the SBA's offset violated his due process rights as follows: 1) by failing to comply with appeal requirements; 2) by failing to comply with the Reorganization Act of 1977 and with publication requirements of the APA; 3) by violating the Freedom Information Act; 4) by violating the requirements of 15 U.S.C.A. §§ 531 and 636; and 6) by violating his civil rights.

Defendant has counterclaimed claiming that Plaintiff is indebted to the United States acting through the SBA for unpaid loans in the amount of $78,323.73. Neither the Plaintiff nor the Defendant has moved for summary judgment on

Defendant's counterclaim, and thus this claim is not addressed in this Order and remains pending.

II. SUMMARY JUDGMENT STANDARDS

"The Court may terminate litigation by rendering a summary judgment where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Honors v. Douglas, 833 F.2d 565, 567 (5th Cir. 1987) (citations omitted). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, ____ (1986); Fed. R. Civ. Pro. 56 (c). "The bare allegations of the pleadings will not suffice" to show the existence of a genuine issue of material fact. Honors v. Douglas, 833 F.2d at 567. Accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202

(1986); Celotex Corp., supra, 477 U.S. at 323-25, 106 S.Ct. at 2553, 91 L.Ed.2d at ____. Thus, the non-moving party must designate specific facts showing there is a genuine issue of material fact for trial. Liberty Lobby, Inc., supra, 477 U.S. at 247-48, 106 S.Ct. at 2510, 91 L.Ed.2d at ____; Celotex Corp., supra 477 U.S. at 322-23, 106 S.Ct. at 2553, 91 L.Ed.2d at ____; Fed. R. Civ. Pro. 56 (e).

III. ANALYSIS

A. JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS

Plaintiff seeks review of the actions of the SBA and ASCS pursuant to 5 U.S.C.A. § 701 (West 1977) et seq.

5 U.S.C.A. § 702 (West 1977) provides judicial review of agency action. 5 U.S.C.A. § 706 governs the scope of review. Texas-Capital Contractors, Inc. v. Abdnor, 933 F.2d 261, 264 (5th Cir.

1990). Section 706(2) provides as follows:

> The reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C.A. § 706. The reviewing court can also
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall

> review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Plaintiff claims that the SBA and the ASCS have acted in an arbitrary and capricious manner and that they have abused their discretion. As stated above, a court can set aside an agency's findings if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." Id. A court, however, is limited to the record before the agency, and must pay great deference to the agency interpretation especially when it "incorporates quasi-technical administrative expertise and a familiarity with the situation acquired by long experience with the intricacies inherent in a comprehensive regulatory scheme." Id., citing Allen N. Campell Co. General

Contractors, Inc. v. Lloyd Wood Construction Co., 446 F.2d 261, 265 (5th Cir. 1971).

B. ASCS

1. ASCS Failure to Exchange Crop Base (Consolidated Complaint Paragraphs 85-98).

In this suit, Plaintiff seeks to appeal the ASCS's decision denying exchange of crop base in 1986, 1987 and 1990.[3] In particular, the Court interprets Plaintiff's pleading to claim:

> a) that under the provisions of 7 U.S.C.A. § 1465(a) (West 1988), the 85 Food and Security Act Title V Section 505(a), Plaintiff has an absolute right to exchange crop acres from cotton to wheat at the rate of

---

[3]The Court notes that there may be inherent problems in this appeal. The 1986 appeal was only at the county level, and the 1990 appeal includes only claims for 1987-1990. Thus, it is questionable whether Plaintiff can revive his 1986 claim by including it in the 1990 appeal because he did not pursue it past the county level.

10% per year; and that he has made this request from 1986 through 1990;
b) that the Secretary of Agriculture has failed to establish procedures to allow him this 10% base acre exchange;
c) that the Secretary has not determined that either a short supply or emergency exist which would justify suspending the 10% crop acreage base exchange under 7 U.S.C.A. § 1465(b) (West 1988).

From 1986 through 1990, the years in question, 7 U.S.C.A. § 1465 (West 1988) (emphasis added) provided as follows:

> a) The Secretary <u>may</u> provide for an upward adjustment of any crop acreage base for any farm for any crop year. Except as provided in subsection (b) of this section, such adjustment may not exceed the number of acres that is equal to 10 percent of the farm acreage base for such farm for such crop year. Any upward adjustment in a crop acreage base must be offset by an equivalent downward adjustment in one or more other crop acreage bases established for the farm for such crop year.
>
> (b) The Secretary may suspend, on a nationwide basis, any limitation contained in subsection (a) of this section with respect to the crop acreage base for any program crop if the Secretary determines that --

> (1) a short supply or other similar emergency situation exists with respect to the program crop; or
> (2) market factors exist that require the suspension of the limitation to achieve the purposes of the program.

The Deputy Administrator for State and County Operations (DASCO) held that the "Secretary may permit the adjustment you request. However, the Secretary is not required to do so." Further, DASCO stated that he was bound to follow the rules contained in the handbook which limited changes in cropping patterns to crops planted and considered in the previous years.

7 U.S.C.A. § 1429 (West 1988) provided that the "[d]eterminations made by the Secretary under this Act shall be final and conclusive." In Martin v. U.S., the Court of Claims has held that the scope of review of the Deputy

Administrator for State and County Operations (DASCO) is limited to whether DASCO acted rationally and within his statutory authority. 20 Cl.Ct. 738, 741-742 (1990). See Knaub v. United States, 22 Cl.Ct. 268, 274 (1991) (The court's role in reviewing administrative determinations under § 1429 is "very limited," but not nonexistent. It must scrutinize whether the officials acted rationally and within their statutory authority.)

The record reveals that DASCO did not exceed his authority or act in an arbitrary manner. The word "may" means that the Secretary has discretion to change the crop acreage base for any farm for any crop year, but that he is not required to do so under the law. Plaintiff's belief that he should have an

"absolute right" to a crop for crop exchange, is erroneous and is not supported by the law.

The Court, thus, finds that the Deputy Administrator (DASCO), correctly denied Plaintiff's appeal. Accordingly, Plaintiff's claim that he is entitled to a declaratory judgment on this basis is DENIED.

Plaintiff's claim that the Secretary failed to establish procedures to allow him to obtain a 10% crop exchange is groundless and unsupported by statute or case law. For this reason and for those reasons stated in subsection four (4) below (General Complaint about U.S. Farming), this claim is DENIED.

2. Plaintiff's Claim to Raise Crop Yields[4]

In this subsection the Court understands Plaintiff to claim that the Secretary has failed to allow Plaintiff to increase his program crop yields to the productive potential of the farm, or to the highest per acre yield in the county pursuant to § 506(c)(2) of the 85 Food and Security Act (FSA). Plaintiff in paragraph 96 alleges that the Secretary should allow changes in yields pursuant to § 504(c) and 508 of the FSA when the yield cannot be established otherwise.

7 U.S.C.A § 1464 (West 1988), § 504 of the FSA, provides for the establishment and maintenance of crop acreage bases for each program crop. In summary, § 1464(b)

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[4]See 7 C.F.R. § 1413 (1989) et seq. In particular refer to § 1413.6 for Farm Program Payment yields, and §§ 1413.8-1413.12 for Farm Acreage Base.

sets the number of base acres of a program crop for the 1986-1989 crop years to equal the average of the acreage planted in each of the five crop years preceding the crop year in question.

In particular, Plaintiff relies on § 1464(c) (emphasis added) which provides that "[t]he secretary may make adjustments to reflect crop rotation practices and to reflect such other factors as the Secretary determines should be considered in determining a fair and equitable crop acreage basis."

The Court determines that Plaintiff improperly relies on § 1464 to seek a change of crop yield. As outlined above, § 1464 only applies to the determination and adjustment of crop acreage base and thus is not applicable to the adjustment

of crop yields.[5] Second, Plaintiff's claim does not fall within §1464(c) because he has not pleaded that the requested adjustment reflected crop rotation practices. Accordingly, Plaintiff's claim under §1464(c) is hereby DENIED.

7 U.S.C.A. § 1468 (West 1988), § 508 of the FSA[6], provides for the

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[5]The Court also notes that even if §1464(c) were applicable, the Secretary would not be required to make adjustment in crop acreage base. Rather he has the discretion to make them. See supra section B(1) for additional discussion about discretionary authority.

[6]§ 1468 reads as follows:

Each county committee may, in accordance with regulations prescribed by the Secretary, provide for the establishment of a farm acreage base, crop acreage base, and farm program payment yield with respect to any farm administratively located within the county if such farm acreage base, crop acreage base, or farm program payment yield cannot otherwise be established under this subchapter. Such bases and farm program payment yields shall be established in a

establishment of bases and yields which cannot otherwise be determined by the county committee. Plaintiff has not alleged that his farm yields can not be determined otherwise. Plaintiff simply alleged in paragraph 95 "[t]hat the activities of the Defendant, ASCS, violated sec. 506(c)(2), & sec. 508 ..., & ASCS handbook 5-PA, 5-PA SCOAP paragraph 124 & 125 by failing to raise Plaintiff's yields to ... [equal the yield of] other farmers in the area or to the productive potential of the farm." The Court finds Plaintiff's allegation in paragraph 95 inadequate to allege a cause of action

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fair and equitable manner, but no such bases or farm program payment yields shall be established for a farm if the producer on such farm is subject to sanctions under any provision of Federal law for cultivating highly erodible land or converted wetland.

under § 1468. Accordingly, Plaintiff's claim under §1468 is hereby DENIED.

7 U.S.C.A. § 1466(b) (West 1988) sets out the basic method of determining program payment yields. Plaintiff relies in particular on § 1466(c)(2) (emphasis added) which reads as follows:

> The county committee, in accordance with regulations prescribed by the Secretary, may adjust any program crop for any farm if the program yield for the crop on the farm does not accurately reflect the productive potential of the farm because of the occurrence of a natural disaster or other similar condition beyond the control of the producer.

Because Plaintiff did not allege any "natural disaster or other similar condition", § 1466(c)(2) does not apply. Accordingly, Plaintiff's claim under § 1466(c)(2) is DENIED.

3. ASCS's and SBA's Failure to Publish
(Consolidated Complaint Paragraphs 37-47, 97, 130, 133, 134, 135)

Plaintiff also claims

> 1) that the ASCS violated 5 U.S.C.A. § 552 when it failed to publish in the Federal Register descriptions of the agency's organizational structure, substantive rules, the handbook of rules that ASCS uses for exchanging crop acreage bases, and raising program yields;
> 2) that ASCS and SBA violated §§ 551-558 (paragraphs 45, 133);
> 3) that ASCS failed to publish in the federal register the handbook with every appeal procedure and every decision of hearings.

5 U.S.C.A. § 552 (West Supp. 1991) sets out the rules and regulations that agencies must publish in the Federal Register (FR) before they can be enforced.[7] Apparently Plaintiff believes

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[7] §552(a)(1) (West 1977) provides that (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

> (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods

whereby, the public may obtain information, make submittals or requests, or obtain decisions; ...

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required resort to, or be adversely affected by, a matter required to be published in the

that publication of these rules and regulations in the Code of Federal Regulations (CFR) does not amount to publication in the Federal Register. (Plaintiff's deposition pages 55-59). However, as a matter of law, the CFR is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal government. Each C.F.R. section contains a reference to corresponding text in the Federal Register. 44 U.S.C.A. § 1510 clearly states that the CFR is prima facie

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Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

evidence of the text of the original documents. § 1501 reads as follows:

> (a) The Administrative Committee of the Federal Register, with the approval of the President, may require, from time to time as it considers necessary, the preparation and publication of special or supplemental editions of the Federal Register of complete codification of the documents of each agency of the Government having general applicability and legal effect, issued or promulgated by the agency by publication in the Federal Register or by filing with the Administrative Committee, and are relied upon by the agency as authority for, or are invoked or used by it in the agency as authority for, or are invoked or used by it in the discharge of, its activities or functions, and are in effect as to facts arising on or after dates specified by the Administrative Committed.
>
> (b) A codification published under subsection (a) of this section shall be printed and bound in permanent form and shall be designated as the "Code of Federal Regulations." The Administrative Committee shall regulate the binding of the printed codification into separate books with a view to practical usefulness and economical manufacture. ...

Wei v. Robinson, 246 F.2d 739, 743 (7th Cir. 1957), cert. denied 355 U.S. 879, 78 S.Ct. 144, 2 L.Ed.2d 109 (Contents of the Federal Register and of the CFR are prima facie evidence of the original text.)

The Court concludes that Plaintiff's allegations that the ASCS and SBA failed to comply with the APA, fail to state a claim upon which relief can be granted. Plaintiff in paragraph 36 has simply alleged "that in a cursory inspection of the Federal Register, Plaintiff has failed to locate where SBA and ASCS ha[ve] complied completely with the Administrative Procedure Act." Accordingly, Plaintiff's allegations are insufficient to state a claim and Plaintiff's claims alleged in this subsection are DENIED.

4. General Complaint about United States Farming
(Consolidated Complaint Paragraphs 99-154)

Plaintiff dedicates the majority of his consolidated complaint to generally arguing that the United States, its statutes, rules, and regulations do not help farmers as originally intended by Congress. Plaintiff in particular claims the following:

> a) that the ASCA handbook and the provisions of 7 CFR §§ 713.12(b)(2) [adjusting crop acreages bases] and 713.100 [limited cross compliance] (1988) do not conform with the Congressional intent that the farm program be efficient, flexible, predictable, and equitable as set out in 7 U.S.C.A. § 1461, that it support farm income, that it provide each farmer with a standard of living equivalent to off farm employment (7 U.S.C.A. § 1301a(1)(G)(2), that target prices set pursuant to 7 U.S.C.A. § 1444e, cover the current cost of production (7 CFR 713.106).
>
> b) that the U.S. acting through the ASCS has violated the policy of parity and fair prices pursuant to

7 U.S.C.A. §§ 602(1), 608, 1301, 1421, and 42 U.S.C.A. § 1981-1983 because the cost of production is greater than the target price system; that ASCS has failed to enhance and strengthen the family farm system as stated in 7 U.S.C.A. § 2266; that ASCS operates the crops surplus in a manner to keep prices down.

c) that the ASCS has violated § 501 of the 85 Food and Security Act and 7 CFR 713.100 by creating handbook rules which do not allow the program to be flexible, equitable, predictable.

d) that the loan rate for all program commodities should be set at 90% parity.

e) that pursuant to the U.S. Constitution, ASCS is obligated to allow Plaintiff to freely choose to farm crops which are profitable. (paragraph 127)

The Court finds that Plaintiff's general attack on U.S. farm policy fails to state a claim upon which relief can be granted. Although the Court recognizes that farmers have been and are still going through hard times, that Congress has

changed policy, and that U.S. statutes and rules are not always fair, the Court is not in a position to grant relief to Plaintiff on this basis. Plaintiff's statements do not raise a cognizable violation of constitutional rights that the Court can consider as a basis of relief. Accordingly, the Court is left with no choice other than to DISMISS Plaintiff's complaint generally challenging the U.S. farming policy and enforcement procedures.

5. Failure to Comply with the Automatic Stay
(Consolidated Complaint paragraph 146)

In paragraph 146, Plaintiff claims that the ASCS violated 11 U.S.C.A. § 362 in that USDA-ASCS attempted to gain control of the bankruptcy estate and the property of the estate through numerous rules and regulations of the ASCS office

which have not been published in the Federal Register.

11 U.S.C.A. § 362 provides among other things that the filing of a chapter 12 bankruptcy "operates as a stay applicable to all entities, of-- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate". Plaintiff claims that the USDA-ASCS through its unpublished rules attempted to gain control of the bankruptcy estate and the property of the estate.

The Court has already held above that Plaintiff's allegations that the ASCS violated the APA did not state a claim upon which relief could be granted.

In connection with the automatic stay, the legislative history following 11

U.S.C.A. § 362 states that the automatic stay was designed to give "the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of financial pressures that drove him into bankruptcy. The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property."

Plaintiff has failed to allege that USDA-ASCS attempted to foreclose on the bankruptcy estate, or that it actively interfered with the repayment and reorganization plan. Plaintiff's claim that ASCS regulations requiring him to produce cotton if he wanted to receive a

maximum ASCS payment, actually controlled the bankruptcy estate in violation of the automatic stay is not supported by 11 U.S.C.A. § 362.

In addition, Plaintiff's claim that the ASCS violated the automatic stay should have been brought in the Bankruptcy Court when Plaintiff's chapter 12 proceedings were pending. The Court cannot now grant retroactive relief on these allegations.

The Court finds that Plaintiff is not entitled to relief on his claim that ASCS-USDA violated 11 U.S.C.A. § 362. Accordingly, Plaintiff's claim is hereby DENIED.

C. SBA

1. The SBA's offset of Plaintiff's ASCS payments
(Paragraphs 48-68)

Plaintiff claims that the administrative offset denied Plaintiff's due process of law and therefore should be set aside by the reviewing court.

On August 31, 1989, the SBA Lubbock District Office notified Plaintiff of its intent to collect its claim against Plaintiff by taking by administrative offset funds due to Plaintiff under the ASCS program. The SBA also gave Plaintiff a copy of his rights under 13 C.F.R. § 140.5(b) which reads as follows:

> Prior to collecting any claim through administrative offset, SBA shall provide the debtor with;
> (1) Written notification, of at least 30 days, concerning the nature and amount of the claim, the intention of SBA to collect the claim through administrative offset, and an explanation of the rights of

> the debtor under paragraph (b) of this section;
>
> (2) An opportunity to inspect and copy SBA's records with respect to the claim;
>
> (3) An opportunity to enter into a written agreement with SBA to establish a schedule for the repayment of the debt; and
>
> (4) An opportunity for review by SBA's office of Hearings and Appeals in accordance with the provisions of Part 134 of these regulations, of SBA's determination of the existence of the claim. The administrative judge will issue a written final decision at the earliest practicable date, but not later than 60 days after the timely filing of the petition requesting the review.

On September 18, 1989, Plaintiff timely filed a petition to review the decision of the district office of the SBA to offset Plaintiff's ASCS payments. On September 21, 1989, the Office of Hearings and Appeals filed a Notice and Order advising Plaintiff that he had fourteen days to submit any additional information that he wanted the Office to consider, and

directing SBA to file its response within 30 days, at which time the record would close. The Notice and Order specifically stated "[a]ll filings must be received by this Office no later than the dates specified..."

On October 18, 1989, Plaintiff untimely filed his Answer. On October 20, 1989, the SBA filed its Answer. On October 26, 1989, the Office of Hearings and Appeals entered its final decision denying Plaintiff's Petition for Review, and holding that the SBA was entitled to offset funds due Plaintiff from the ASCS.

The Administrative Law Judge did not consider Plaintiff's Answer which was not timely. The Court finds this was not an abuse of discretion. Plaintiff never moved for leave to file his Answer out of time. See Hoover v. Blue Cross & Blue

Shield of Alabama, 855 F2d 1538, 1544 (11th Cir. 1988).[8] Moreover, the Administrative Law Judge had a right to disregard untimely filed documents because he was required to issue a decision no latter than 60 days under 13 C.F.R. § 140.5.

In his Consolidated Complaint at paragraph 53(g), Plaintiff claims that he was denied due process because the Office of Hearings Appeal (OHA) did not grant him an oral hearing. 13 C.F.R. § 134.1(g) provides that "[n]o oral hearing shall be granted unless there is genuine dispute as to a material fact of decisional significance that cannot be resolved

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[8]In Hoover v. Blue Cross & Blue Shield of Alabama, the Eleventh Circuit held that a District Court properly disregarded additional claims raised in a pleading filed without leave under Rule 15(a). 855 F.2d 1538, 1544 (11th Cir. 1988).

except by confrontation of witnesses." On appeal, the administrative law judge denied Plaintiff's request for a hearing because the requisite condition for an oral hearing did not exist.

As evidence by paragraph 53(g) of his Amended Complaint, Plaintiff sought an "oral hearing to explain all the material presented or any new information which could be entered at the hearing." Paragraph 1 to the Original Petition to the OHA. Plaintiff did not claim the existence of a genuine issue of material fact that could not be resolved other than by confrontation of witnesses. Accordingly, the Court finds that the administrative law judge did not abuse his discretion in denying an oral hearing.

In paragraphs 53(i)-(q), Plaintiff alleges that he was denied due process for the following reasons:

> 1) the appeal process was too fast;
> 2) Plaintiff was not held to the less stringent standard to which pro-se plaintiffs are entitled;
> 3) the agency did not present the law to Plaintiff;
> 4) the agency should have given Plaintiff a copy of 13 C.F.R. §134-140, along "with a manual showing how to handle 200 administrative appeals with the SBA ... and a complete manual on freedom of information and court room procedure ...";
> 5) the 30 days notice provided by § 140.5(b)(1) was not sufficient.

The Court notes that all of Plaintiff's general claims are mere suggestions. No statute, regulation, or case states that the SBA has to provide Plaintiff with a manual on how to interpret the code of federal regulation, or that the SBA has to present the law to Plaintiff.

Plaintiff also claims that pro se plaintiffs should be held to less stringent standards than lawyers during administrative appeals, just as pro se complaints are held to less stringent standards than attorneys in formal pleading. He cites Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), in support of this proposition.

The Court notes that Haines only dealt with pro se complaints and not with special treatment of pro se plaintiffs during trial, or a hearing. Further, the Court has not found any case law supporting the proposition that pro se plaintiffs are entitled to special treatment during a trial or an administrative hearing. In an event Plaintiff's pleadings have been liberally construed by this Court since the filing

of the first case.[9] Accordingly, the Court concludes that Plaintiff's claims for relief are unfounded and are hereby DENIED.

Plaintiff also claims that the statute of limitations bars SBA's right to administrative offset. (Paragraphs 53(v)

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[9]Since the original filing on September 8, 1989, Plaintiff has filed two additional actions which the Court consolidated under the original cause number because they raised similar questions of fact and law.

The Court has given Plaintiff repeated opportunities to allege a claim. On December 27, 1989, November 11, 1990 (in CA-2-90-0051) and again on February 1, 1991, the Court granted Plaintiff's Motions for leave to Amend. Furthermore, Plaintiff filed additional complaint in causes number CA-2-90-0051 on March 2, 1990, and in Ca-2-91-0028 on February 6, 1991.

The Court has spent an inordinate amount of time trying to understand Plaintiff's claims since the inception of this litigation. The Magistrate has also handled numerous hearings to narrow Plaintiff's claims (November 13, 1990), to resolve discovery disputes (August 17, 1990, May 10, 1991), and to settle the dispute in question (July 3, 1991).

and (w)) First, he alleges that the old 6 year statute of limitation which was effective prior to 1983 should apply. Second, Plaintiff argues that even if the 10 year statute of limitations is applicable, SBA's claim for administrative offset is barred by the statute of limitations. 31 U.S.C.A. § 3716(c)(1), 7 C.F.R. § 13.5(b) (Plaintiff's Deposition at pages 94-95).

The general rule is that "where the acceleration of the installment payments in cases of default is optional ..., then the entire debt does not become due on the mere default of payment but affirmative action by the creditor must be taken to make it known to the debtor that he has exercised his option to accelerate ..." Curry v. United States, SBA, 679 F.Supp. 966, 969 (N.D.CA. 1987), citing United

States v. Rollinson, 629 F.Supp 581 (D.D.C. 1986).

The statute of limitations on the SBA loans does not accrue until the date the demand for payment or the notice of acceleration of debt is made. To prevent any delay, courts have held that a creditor does not have a right to delay the running of the statute of limitations by failing to make a demand or to accelerate a debt within a reasonable time. United States v. Rollinson, 629 F.Supp. 581 (D.D.C. 1986), affirmed 866 F.2d 1463 (D.C.Cir. 1989), cert. denied ____ U.S. ____, 110 S.Ct. 71; Curry, 679 F. Supp. at 969. But see U.S. v. Boozer, 732 F.Supp. 20 (N.D.N.Y. 1990).

On March 13, 1985, the SBA accelerated payment on the August 21, 1978 note of $53,300, and the October 2, 1979

note of $13,700. The applicable statute of limitations thus began to run on that date, March 13, 1985. United States v. Rollinson, 629 F.Supp. 581 (D.D.C. 1986), affirmed 866 F.2d 1463 (D.C.Cir. 1989), cert. denied ____ U.S. ____, 110 S.Ct. 71. Plaintiff does not claim that the SBA unreasonably delayed in demanding payment on both loans in that the SBA reasonably gave Plaintiff a chance to repay before accelerating the whole amount. The Court thus finds that the SBA's offset, begun in August, 1989, four years after accelerating the payment, is clearly within both the 6 and 10 year statutes of limitations, and that the Administrative Judge correctly applied the law.

The Court after reviewing the record of the agency concludes that the Decision

of the SBA was not arbitrary and capricious and thus stands on appeal.

2. Freedom of Information Act (Consolidated Complaint Paragraph 53(a))

In paragraph 53(a) Plaintiff claims that he made two freedom of information requests to the SBA pursuant to 5 U.S.C.A. § 552 during the administrative appeal of the administrative offset. Plaintiff's deposition reveals that Plaintiff considers his two discovery requests, as requests under the Freedom of Information Act. Exhibits 2 and 3 to Plaintiff's deposition. (Plaintiff's deposition pages 68-75).

> Q. Yeah, I understand. Now, I want to .... I don't want to cut you off. If you've got a request under the Freedom of Information Act that you presented to .... this one deals with the SBA, would you provide a copy of that request to us?
> A. Yeah. It would just be the request that's in the file.
> Q. The discovery request?

A. Yeah.
Q. And you don't have anything else.
A. That is correct. That's the only one.
Q. That is the only thing that you have.
A. Uh-huh.

Plaintiff's deposition page 75, lines 9-21.

The court notes that Plaintiff did not make reference in these discovery requests to either the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (West Supp. 1991) or to the S.B.A. regulations relating to FOIA requests 13 C.F.R. § 102 (1990), et seq. Rather, the Plaintiff made his discovery requests pursuant to 13 C.F.R. § 134.24, which lays out the rules for hearings and appeals of SBA's decision. 13 C.F.R. § 134.24(a) reads as follows:

> (a) Except as provided in paragraph (b) of this section, in the judge's discretion, and upon motion, a party

> may obtain discovery in the form of requests for admissions, interrogatories, depositions, or requests for production of documents, regarding any matter not privileged, that is relevant to the subject matter of the proceeding.

The Court finds that Plaintiff did not make a request under the Freedom of Information Act (FOIA) at the agency level, but rather made a discovery request. The agency denied Plaintiff's request for discovery under 13 C.F.R. § 134.24 because the information requested was not relevant to the subject matter of the proceedings before it. See OHA decision of October 26, 1989, page 3. The Court concludes that Plaintiff can not now claim that his discovery request was a FOIA request and that he is entitled to judicial review. Accordingly, the Court will not review Plaintiff's FOIA's request, and Plaintiff's claim is hereby

DENIED for failure to assert it at the agency level.

Plaintiff also claims that the SBA's decision of October 26, 1989, refusing the discovery request does not state that Plaintiff was entitled to judicial review pursuant to 13 C.F.R. § 102.5(e)(2) (1990). 13 C.F.R. § 102.5(e)(2) (1990) provides that

> [i]f the decision upholds the refusal to disclose, the notice shall set forth the exemptions from disclosure under the Freedom of Information Act which form the basis of the decision. The notice shall also advise that judicial review is available on complaint to the district court of the United States in the district in which the appellant resides, or has his principal place of business, or in which the Agency records are located, or in the District of Columbia.

The Court finds that 13 C.F.R. § 102.5(e)(2) does not apply to the OHA's decision of October 1989 because Plaintiff

had not made a FOIA request. Accordingly, Plaintiff's claim under § 102.5(e)(2) and (3) is hereby DENIED.

3. SBA's failure to comply with the Reorganization Act (Consolidated Complaint Paragraph 44A)

In paragraph 44A, Plaintiff alleges that the SBA has failed to comply with the requirements of the Reorganization Act of 1977, 5 U.S.C.A. § 901 et seq., because it failed to publish in the Federal Register the latest plan of reorganization pursuant to 5 U.S.C.A. § 906.

5 U.S.C.A. § 903 states that "[w]henever the President, after investigation, finds that changes in the organization of agencies are necessary to carry out any policy set forth in section 901(a) of this title, he shall prepare a reorganization plan specifying the reorganizations he finds are necessary."

The publication requirements of § 906 are not triggered if the President does not decide changes are necessary. Plaintiff has not alleged that the President decided that a reorganization of the SBA was necessary or that a reorganization plan was transmitted to Congress for approval. Accordingly, Plaintiff's claim under 5 U.S.C.A. § 906 is hereby DENIED.

4. Plaintiff's claim under 15 U.S.C.A. §§ 631 and 636 (Consolidated Complaint Paragraph 53(h), 69-84)

In paragraph 70, Plaintiff alleges that under 15 U.S.C.A. § 636(c) SBA was obligated to suspend the loans if the Plaintiff would be placed in severe hardship by making the payment on the loan. 15 U.S.C.A. § 636(c) (West Supp. 1991) contains several subsections. The

Court believes that Plaintiff is referring only to subsection (1) which provides that

> (1) The Administration may further extend the maturity of or renew any loan made pursuant to this section, or any loan transferred to the Administration pursuant to Reorganization Plan Numbered 2 of 1954, or Reorganization Plan Numbered 1, of 1957, for additional, periods not to exceed ten years beyond the period stated therein, if such extension or renewal will aid in the orderly liquidation of the loan.

15 U.S.C.A. § 636(c)(1) (West Supp. 1991) or any other subsection does not contain any reference to severe financial hardship. Accordingly, Plaintiff's claim is not supported by the statute.

Plaintiff also relies on § 636(b)(2) claiming that SBA should have suspended the payment of principal and interest charges, and extended the maturity of the loan. Because 15 U.S.C.A. §636(b) (West Supp. 1991) excepts agricultural

enterprises as defined in section 647(b)(1), subsection two does not apply.

In addition, he claims that pursuant to § 636(a)(7), SBA should have deferred payments on the principal in order to assure the successful establishment and operation of Plaintiff's farm. The Court finds that his claim is groundless. As Plaintiff stated in his deposition at page 115, Plaintiff has not made a principal payment in over ten years. The principal payment has been deferred as a matter of undisputed fact. Accordingly, Plaintiff's claim is unsupported.

In paragraph 74, Plaintiff claims that the SBA violated §631(c) because it failed to assist and aid his farm. Section 631 generally lays out Congressional policy with regard to the

SBA. §631(c) in particular provides as follows:

> [i]t is the declared policy of Congress that the Government, through the Small Business Administration, should aid and assist small business concerns which are engaged in the production of food and fiber ... and all other farming and agricultural related industries, and the financial assistance programs authorized by this chapter are also to be used to assist such concerns.

The Court finds that Plaintiff's allegations are not supported by § 631(c).

Lastly Plaintiff complains that the SBA violated §§636(i)(1) and (j)(1) when it failed to defer payments on principal for grace periods, and to discharge the loans in order to assure the successful operation of Plaintiff's farm. (paragraph 81 Consolidated Complaint). 15 U.S.C.A. § 636(i)(1) (West Supp. 1991) reads as follows:

> The Administrator is also empowered to make ... loan repayable in not more than fifteen years, to any small business concern, or to any qualified person seeking to establish such a concern, when it determines that such loans will further the policies established in section 631(b) of this title .... The Administrator may defer payments on the principal of such loans for a grace period and use such other methods as it deems necessary and appropriate to assure the successful establishment and operation of such concern. The Administrator may ... require that the borrower take steps to improve his management skills ...

As stated above, Plaintiff has not made a principal payment in over ten years. Thus, he can hardly argue that he has not received a deferment of the principal payment for a "grace period." Accordingly, Plaintiff's claim is not supported by the law.

Plaintiff claims that the SBA failed to provide technical management assistance under § 636(j)(1). Section 636(j)(1) allows the Administrator to provide

financial assistance to organizations providing management assistance to individuals or enterprises eligible for assistance under subsection (i), and subsection (j)(10).[10] The Court construes this section to provide assistance to the organizations that help individuals such as Plaintiff, but not to provide technical management assistance to the individuals directly. Thus

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[10]15 U.S.C.A. § 636(j)(1) (West Supp. 1991) provides as follows:

(1) The Administration shall provide financial assistance to public or private organizations to pay all or part of the cost of projects designed to provide technical or management assistance to individuals or enterprises eligible for assistance under subsection(i) of this section, paragraph (10) of this subsection, and section 637(a) of this title, with special attention to small businesses located in areas of high concentration of unemployed or low-income individuals, to small businesses eligible to receive contracts pursuant to section 637(a) of this title.

Plaintiff's claim is also not supported by § 636Ij)(1).

Accordingly, all of Plaintiff's claims under §§ 631(c), 636(a)(7), (b)(2), (c), (i)(1), and (j)(1) are not supported by the law and thus are DENIED.

D. CIVIL RIGHTS CLAIM
(Consolidated Complaint Paragraphs 53(r), 63 and 124)

Plaintiff also alleges that he SBA and ASCS have violated his civil rights under 42 U.S.C.A. §§ 1981-1983 as follows:

> 1) because the SBA allows technical and management assistance to other small business, but not to a farmer such as Plaintiff, when help is needed in restructuring a loan; and 2) because he was not allowed to sell his farm products at a profit.

On November 5, 1990, the Court entered its Order finally dismissing Plaintiff's Civil Rights Claims under 42 U.S.C.A. §§ 1983-1986. On February 1, 1991, Plaintiff filed his Consolidated

Complaint for Declaratory Judgment and Rights, and alleged once again some of the dismissed civil rights violations.

First, the Court notes that its November 5, 1990 order dismissed all of Plaintiff's civil rights claim and that Plaintiff improperly amended his complaint to reallege those claims. However, because Plaintiff is proceeding pro se the Court will address in detail the new civil rights claims.

42 U.S.C.A. § 1981 was designed to prevent racial discrimination. A claim under §1981 must be factually supported by intentional racial discrimination. Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981). Plaintiff has not alleged any racially discriminatory intent as well as disparate impact on the part of Defendants in his complaint nor in the briefs

supporting his Motions for Summary Judgment. Accordingly, Plaintiff's civil rights action on the basis of 42 U.S.C.A. § 1981 is not supported by the law and it is hereby DENIED.

Similarly § 1982 bars all types of racial discrimination in the inheritance, purchase, lease, sale, conveyance of real and personal property. As stated above, Plaintiff has failed to allege that Defendant has racially discriminated against him and therefore § 1982 is not applicable. Accordingly, Plaintiff's claim under § 1982 is not supported by the law and it is hereby DENIED.

"To survive a motion to dismiss, a pleading that raises a section 1983 claim must allege both that someone violated a right that the Constitution or laws of the United States secures and that the

offender did so under color of state law." Arnaud v. Odom, 870 F.2d 304, 307 (5th Cir. 1989), cert. denied 110 S.Ct. 159. Moreover a plaintiff may not "plead merely conclusory allegations to successfully state a section 1983 claim but must instead set forth specific facts which, if proven, would warrant the relief sought." Id., citing Elliot v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985).

The first cause has been pending for over two years and one month. The parties have already completed their discovery. Moreover, the consolidated action has been set on the Court's docket for more than four months. Therefore, Plaintiff has had adequate time, even considering his pro-se status, to plead with more specificity his 1983 claim. In Mills v. Criminal Dist. Ct. No. 3, the Fifth Circuit stated that

"[a]lthough we treat pro se pleadings more liberally, some facts must be alleged that convince us that the Plaintiff has a colorable claim; conclusory allegations will not suffice." 837 F.2d 677, 678 (5th Cir. 1988).

In his consolidated complaint filed on February 1, 1991, Plaintiff alleges in paragraph 53(r) that his

> civil rights have been violated (42 U.S.C.A. §§ 1981-1983) since SBA allows technical and Management assistance to other small business, but not to Plaintiff. A farmer is entitled to these programs (15 U.S.C.A. §§ 631-636). Plaintiff does not find the farmer excluded. Plaintiff was a eligible borrower for SBA loans, when these loans were taken out, but when restructuring is requested Plaintiff no longer is an eligible borrower for restructuring.[11]

In addition, in paragraph 124, Plaintiff alleges that his

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[11] See discussion on 15 U.S.C. § 631-636 above in section c(4).

> civil rights have been violated (42 U.S.C.A. §§ 1981-1983) for not being allowed to sell his farm products at a profit as other business concerns are allowed to sell their goods and services at a profit or fair market value.

The Court finds that in the above allegations Plaintiff neither asserted a violation of constitutional rights, nor that the violation occurred under color of state law. Accordingly, Plaintiff's civil rights claim is not supported by the law and it is hereby DENIED.

IV. CONCLUSIONS

Plaintiff as the party seeking summary judgment has not made an initial showing negating all disputed, material facts. Accordingly, Plaintiff's Motions for Summary Judgment against the SBA and ASCS are DENIED.

Defendant in its Responses contends that the Government is entitled to summary

judgment. The Court finds that Defendant's Responses amount to cross motions for Summary Judgment[12], and that Defendant has made an initial showing negating all disputed material facts. Accordingly, Defendant's prayer for Summary Judgment in its favor on Plaintiff's cause of action is GRANTED.

The decision of the SBA office of Hearings and Appeal holding that the SBA could take administrative offset of Plaintiff's ASCA payment is not arbitrary and capricious, and thus it stands on appeal.

The decision of the Deputy Administrator for State and County Operations (DASCO) that the Secretary may

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[12] See supra f.n. 1, addressing when a district court can sua sponte enter summary judgment in favor of the non-movant.

adjust crop acreage base but is not required to do so, is not arbitrary and capricious and thus it stands on appeal

The following causes of actions are not supported by the law and thus are DENIED:

1) that the Secretary failed to establish procedures to allow Plaintiff to obtain a 10% crop exchange;

2) that Plaintiff has a claim under 7 U.S.C.A. §§ 1464(c), 1468, 1466(c)(2);

3) that ASCS and SBA violated the Administrative Procedure Act;

4) that U.S. farming policy is a failure;

5) that the ASCS interfered with the automatic stay of the Bankruptcy Court;

6) that the SBA violated the Freedom of Information Act;

7) that the SBA failed to comply with the Reorganization Act of 1977;

8) that SBA violated §§ 631(c), and 636(a)(7), (b)(2), (c)(1), (i)(1), (j)(1);

9) that ASCA and SBA violated 42 U.S.C.A. §§ 1981-1983.

IT IS SO ORDERED.

Signed this the _____ day of October, 1991.

_____
MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1136

LAURANCE KRIEGEL,
Plaintiff-Appellant,
versus
UNITED STATES OF AMERICA,
acting through the Small Business Administration (SBA), The United States Department of Agriculture (USDA), and the Agriculture Stabilization Conservation Service, (ASCS),
Defendants-Appellees.

Appeal from the United States District Court for the northern District of Texas (CA-2-89-0175 c/w CA-2-90-51 & CA-291-28)

Before WIENER, BARKSDALE, AND DEMOSS, Circuit Judges. PER CURIAM:*

Having reviewed the briefs and the record, we hold that Fed. R. Civ. P. 56 was complied with, and, as to the other issues raised by appellant, affirm the summary judgment granted appellees for essentially the reasons stated by the district court in its detailed and comprehensive opinion.

APPENDIX G

AFFIRMED.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1136

LAURANCE KRIEGEL,
Plaintiff-Appellant,
versus
UNITED STATES OF AMERICA,
acting through the Small Business Administration (SBA), The United States Department of Agriculture (USDA), and the Agriculture Stabilization Conservation Service, (ASCS),
Defendants-Appellees.

Appeal from the United States District Court for the northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 3/19/93, 5 Cir., ___,____F.2d___)

(April 21, 1993)

Before WIENER, BARKSDALE AND DeMOSS, Circuit Judges. PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the

Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is Denied.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is Denied. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

original signed by

_____

United States Circuit Judge

APPENDIX H

THE ORGANIC LAWS OF THE UNITED STATES OF AMERICA

THE DECLARATION OF INDEPENDENCE 1776

[Par. 2] We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, depriving their just powers from the consent of the governed,

ARTICLE III TO THE

UNITED STATES CONSTITUTION

Section 2 [par. 1]. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;- to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

APPENDIX J

AMENDMENT V TO THE

UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the Same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within in jurisdiction the equal protection of the law.

NO. 93-

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IN THE
SUPREME COURT OF THE UNITED STATES COURT
OCTOBER TERM, 1993

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LAURANCE KRIEGEL,

Petitioner

vs.

UNITED STATES OF AMERICA

Acting through the Small Business Administration (SBA), the United States Department of Agriculture (USDA), and the Agriculture Stabilization Conservation Service (ASCS), Respondent

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PROOF OF SERVICE

I, Laurance Kriegel, do swear that on this date, July 16th, 1993, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached PETITION FOR WRIT OF

CERTIORARI on each party to the above proceeding, or the party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

James P. Laurence, Assistant U. S. Attorney, Room 16 G, 1100 Commerce Street, Dallas, Texas 75242-1699, and Daniel A. Bowen, Assistant Regional Attorney, Office of the General Counsel, United States Department of Agriculture, Temple, Texas 76501

Laurance Kriegel

Laurance Kriegel, Pro Se
Affiant, Petitioner

Subscribed and Sworn to Before Me this 15th day of July, 1993.

Karen L. Cullum

Notary Public in and for said County and State